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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 255.

EMILIE MOULOR, PLAINTIFF IN ERROR,

vs.

THE AMERICAN LIFE INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 9, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 255.

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4 In the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit. April session, 1873.

EMILIE MOULOR, A CITIZEN OF THE STATE of Louisiana
vs. } No. 19.
THE AMERICAN LIFE INSURANCE COMPANY, A corporation under the laws of Pennsylvania.

UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, ss:

Pleas and proceedings before honorable the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit of April session, 1873, No. 19.

It is thus contained:

Be it remembered that on the twentieth day of May, in the year of our Lord one thousand eight hundred and seventy three, Emilie Moulor by her attorney James Parsons, esquire, comes into court here and sues forth therefrom a writ of summons against the American Life Insurance Company, which with the indorsement and return
5 thereto is in the words and figures following, to wit:

6 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon The American Life Insurance Company, a corporation under the laws of the State of Pennsylvania, late of your district, if it may be found therein, so that it be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia, on the first Monday of June next, to answer to Emilie Moulor a citizen of the State of Lonisiana in a plea of debt.

And have you then there this writ.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States at Philadelphia, this twentieth day of May, A. D. 1873, and in the ninety-seventh year of the Independence of the United States.

{ SEAL U. S. CIRCUIT COURT E. D. PENNSYLVANIA. } W. GRIER HEBLER, *Pro Clerk of Circuit Court U. S.*

7 MAY 20, A. D. 1873.

Served the within writ on John S. Wilson, secretary of the within named American Life Insurance Company by reading the same in his hearing and leaving a true and attested copy thereof with him.

So answers—

JAMES N. KERNS,
U. S. Marshal.
P'r J. A. GREGORY,
Deputy.

(Indorsed;) No. 19. Circuit court, April session, 1873. Emilie Moulor vs. American Life Insurance Company. Summons. Debt. Returnable on the first Monday of June next. James Parsons, attorney for plaintiff. Filed 2nd June, 1873.

8 And afterwards to wit, on the third day of June, A. D. 1873, the plaintiff by her attorney, James Parsons, esquire, comes into court here and files her narr., which being read is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania. Of April sessions, 1873. No. 19.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The American Life Insurance Company, a corporation duly chartered under the laws of the Commonwealth of Pennsylvania, was summoned to answer Emilie Moulor, a citizen of the State of Louisiana of a plea of debt, and thereupon the said plaintiff, by James Parsons, her attorney, complains. For that whereas, heretofore to wit, on the seventeenth day of June, A. D. 1872, at Philadelphia, in the said district, by a certain instrument or policy of insurance, sealed with the common seal of the said corporation, and which said instrument the plaintiff now
9 brings here into court, the date whereof is the same day and year aforesaid, it was witnessed that the American Life Insurance Company in consideration of the representations made to them in the application of the said policy and the payment to them in hand of four hundred and twenty-five $\frac{50}{100}$ dollars, the receipt whereof was thereby acknowledged, and of the further annual premium of four hundred and twenty-five $\frac{50}{100}$ dollars, on the seventeenth day of June in each and every year during the continuance of said policy, did insure the life of Louis Moulor, of New Orleans, in the county of Orleans, State of Louisiana, in the sum of ten thousand dollars, for the term of his natural life.

And that the said corporation did covenant, promise, and agree well and truly to pay or cause to be paid the said sum insured, at their office in the city of Philadelphia, to Emilie, wife of said Louis Moulor, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of the
10 said Louis Moulor, deducting therefrom any indebtedness to the company, and any unpaid balance as the premium of the current year. Provided always, and it was hereby declared to be the true intent and meaning of the said policy, and was accepted by the assured upon these express conditions, that in case the said Louis Moulor should without the consent of the said corporation, previously obtained in writing, visit those parts of the United States which lie south of 32 degrees of north latitude, between the first of June and the first of November, though it was indorsed on the margin that all restrictions as to travel and residence were removed, or should without the consent of the said corporation, previously obtained in writing, enter into any military or naval service whatsoever (the militia not in actual service excepted), or should, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or as a conductor, brakesman or hand upon a railroad, or as an officer,
11 hand, or servant of any steam vessel, or in case he should die by his own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium, or other narcotic, or in violation of any law of any of these States, or of the United States, or of any state or country, then the said policy should be void, null, and of no effect; except that in case he should die by his own hand while insane, the amount to be paid by

the said corporation on the said policy should be the amount of the premium sactually paid thereon.

And it was thereby declared, covenanted, and agreed that if the representations and answers made to the said corporation in the application for the said policy, upon the full faith and credit of which it was issued, should be found to be untrue in any respect, or that there had been any concealment of facts, then and in such case the said policy should be null and void, or in case the said premiums should not be paid at or before 12 o'clock (noon) on the several days specified
12 and appointed for the payment of the same at the office of the said corporation in the city of Philadelphia, or to agents when they produce receipts signed by the president or treasurer and with the corporate seal of the said corporation, then and in every such case the said corporation should not be liable to the payment of the sum insured, or any part thereof, and the said policy should cease and determine and all payments made should be forfeited to the said corporation, but after three or more full years' premiums have been paid thereon the said corporation will issue a paid-up policy, payable at death, for about the amount of the premiums paid, provided application were made for the same, and the said policy while yet in force should be duly surrendered up to the said corporation.

And it was also covenanted and agreed that the said policy and the insurance thereby effected should be subject to the several conditions and regulations printed on the back thereof, so far as the same could be applicable, in the same manner as if the same respectively were incorporated in the said policy.

13 And the conditions upon which the said insurance was made, according to the said policy, were as follows, to wit:

1. Policies expire at noon on the last day of the period for which payment has been made.

2. If a change takes place in the name or in the residence of the insured, notice of such change must be given to the company.

3. Agents are not authorized to make contracts for the company nor to write upon the policy (except his signature when necessary to the first receipt of premium; see condition No. 5), nor to waive forfeiture of the same.

4. In case of the assignment of a policy (whether as a security or otherwise) satisfactory proofs of the amount of the assignee's interest in the insured life must be furnished with the proofs of death.

5. Receipts for premiums (excepting the first to be found *to be found* on the face of this policy) will invariably be given on a separate paper, and will not be valid without the seal of the company.

Proofs of loss required:

1. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration,
14 and the date and hour of decease; his apparent age, height, complexion, and general appearance.

2. Certificate of a friend or intimate acquaintance stating the disease of which the party died, how long he was sick, a knowledge of such death and how obtained, and the time of death.

3. Certificate of sexton or undertaker who superintended the funeral of insured and saw his remains interred, stating apparent age, height, complexion, and general appearance.

The said certificates must be sworn or affirmed to before some magistrate or public officer empowered to administer an oath, accompanied by a certificate, in conformity to the act of Congress, of the authorities

of the officer who administers the oath. The necessary receipt on the payment of the policy. When it is a policy on the life of a husband for the benefit of a wife, or the life of a wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned policy, a receipt on the policy from the party legally entitled to the
15 payment is all that is required. But when a party insures his own life, in case of death, the insurance must be collected by an executor or administrator legally authorized to settle the estate, and the official certificate of his appointment by the proper tribunal to that effect must be presented at the office of the company, with the policy duly receipted by said executor or administrator.

Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments or a waiver of the forfeiture of the policy according to the conditions therein expressed; if any future payment of premium be omitted on the day it falls due the company will not be liable for any omission to notify the assured of the time when the premiums fall due. Agents of the company are in no case authorized to make, alter, or discharge contracts or waive forfeiture. That the said policy should not be valid until the actual payment of the pre-
16 mium had been made and receipted for at the bottom of the said policy by the treasurer or by John D. Scott, agent for Louisiana.

In witness thereof, the president of the said American Life Insurance Company, on behalf of the board of trustees, thereunto subscribed his name, George Hill, attested by the secretary, John S. Wilson, and caused the common seal of the said corporation to be affixed at the office in Philadelphia on the seventeenth day of June, 1872, and the receipt of four hundred and twenty-five $\frac{50}{100}$ dollars, the first premium, to be acknowledged by John D. Scott, manager for Louisiana.

And the plaintiff avers that afterwards, to wit, on the third day of January, A. D. 1873, and while the said policy of insurance was in full force and effect, the said Louis Moulor died; that due notice of the death of the said Louis Moulor was given to the defendants within a reasonable time after the happening of the said death, to wit, under the date of January 16, 1873; and that satisfactory proofs of the said death were furnished the said defendants under the same date, in
17 due form of law, and that at the bringing of this suit, more than sixty days had elapsed since the giving of said due notice, and of furnishing satisfactory proofs to the defendants of the death of the said Louis Moulor, and that the said death was not caused by the doing of any unlawful act within the meaning of the said policy, and that all and singular other the agreements, covenants, stipulations, and conditions of the said policy by the said Louis Moulor or the plaintiff to have been fulfilled, performed, and complied with, were fulfilled, performed, and fully complied with by the said Louis Moulor before and up to the time of his death, and by the plaintiff since the same occurred, according to the form and effect of the said policy.

And the plaintiff further avers that although the said Louis Moulor, before and up to the time of his death, and the plaintiff since the same occurred, did, and have in all things conformed themselves to, performed, observed, fulfilled, and kept all things in the said policy
18 and conditions and provisions contained on their part to have been conformed to, observed, fulfilled, and kept, according to the form and effect of the said policy, and the agreements, covenants, stipulations and conditions thereof, as aforesaid.

Yet the defendants have never, *theless* often requested, paid the said sum of ten thousand dollars, or any part thereof, to the plaintiff; but on the contrary thereof have hitherto wholly neglected and refused, and still do neglect and refuse so to do, and the said sum, together with a further sum of three thousand dollars for interest thereon, is still due and unpaid, whereby an action hath accrued to the plaintiff to have and demand of the defendants the said sums above mentioned.

And whereas said defendants afterwards, to wit, on the nineteenth day of May, A. D. 1873, in the district aforesaid, were indebted to the said plaintiff in the further sum of ten thousand dollars for so much money had and received by the said defendants to and for the use of the plaintiff, and to be paid by the said defendants to the said plaintiff, when the said defendants should be thereunto afterwards re-
19 quested, which the said plaintiff often hath done, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to have and demand of the defendants the said last-mentioned sum of ten thousand dollars, together with the further sum of three thousand dollars for interest thereupon above demanded, yet the said defendants, although often requested so to do, have not paid the said sums or any part thereof to the said plaintiff, but the said defendants so to do have wholly neglected and refused, and still do refuse.

And whereas the said defendants afterwards, to wit, on the 21st day of April, 1873, in the district aforesaid, accounted with the said plaintiff of and concerning divers other sums of money before that time then due and owing and in arrear and unpaid from the said defendants to the said plaintiff, and upon that accounting the said defendants were then and there found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars, to be paid by the de-
20 fendants to the said plaintiff, when they, the said defendants, should be thereunto afterwards requested, whereby and by reason of the last mentioned sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiff to demand and have of and from the defendants the said last-mentioned sum of ten thousand dollars, together with the further sum of three thousand dollars for interest thereupon above demanded, yet the said defendants, although often requested so to do, have not paid the said sums or any part thereof to the said plaintiff, but the said defendants so to do wholly have neglected and refused, and still do refuse, to the damage of the said plaintiff of thirty-nine thousand dollars, and therefore she brings suit.

JAMES PARSONS,
Attorney for Plaintiff.

21 (Endorsed:) 19. April sess., 1873. U. S. C. C. Moulor vs. American Life Insurance Co. Nan.

Please enter note to plead in 8 days or judgt. sec. req.

JAS. PARSONS,
Att'y for Pl'ff.

To clerk U. S. C. C.

Filed 3rd June, 1873.

JAS. PARSONS.

And afterwards, to wit, on the fifth day of June, A. D. 1873, the defendants, by their attorneys, Henry Hazlehurst, esquire, and Isaac Hazlehurst, esquire, file their pleas, *with* being read is as follows, to wit:

U. S. C. C. April sessions, 1873.

EMILIE MOULOR
vs.
AMERICAN LIFE INS. CO. } No. 19.

Defendant pleads (I) nil debit; (II) payment.

HAZLEHURST,
For Deft.

To the clerk C. C. U. S.
JUNE 5TH, 1873.

22 (Endorsed:) 19. U. S. C. C. Apr. s., '73. Emilie Moulor vs. Amer. Life Ins. Co. Pleas. Filed 5th June, 1873. Hazlehurst, for defts.

23 And afterwards, to wit, on the 17th day of March, A. D. 1876, the defendants, by their attorneys, come into court here and file special pleas, which being read is as follows, to wit:

U. S. C. C. Of April sess., 1873.

MOULOR
vs. } No. 19.
INS. CO.

The defendants, by Isaac Hazlehurst, esq., their attorney, for an additional plea, plead:

1. Set off.

2. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policy of insurance in said counts mentioned was obtained from the defendants by the fraud, covin and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the plaintiff. Wherefore the defendants say that the said policy of insurance is void in law, and this the defendants are ready to verify.

3. And for a further plea in this behalf the defendants, as to
24 the first and second counts of the declaration, say that the policy of insurance in said counts mentioned was obtained from the defendants by the fraud, covin and wrongful concealment of certain material information which ought then to have been communicated to the defendants and by the misrepresentations of the assured.

Wherefore the defendants say that the said policy of insurance is void in law, and this the defendants are ready to verify.

(Endorsed:) C. C. U. S. No. 19. Of Apr. s., 1873. Moulor vs. Ins. Co. Special pleas. Hazlehurst. Filed March 17, 1876.

25 And afterwards, to wit, on the third day of April, A. D. 1876, a jury being called, come, to wit:

1. Henry Myers.
2. Theodore D. Wheaton.
3. Abraham B. Long.
4. Isaac C. Neale.
5. Martin S. Fry.
6. Jacob T. Kulp.
7. Jacob De Haven.
8. George W. Jones.
9. Augustus R. Hall.
10. Benjamin L. Berry.
11. Phares G. Reinhold.
12. James Baird.

Who are respectively sworn or affirmed to try the issue joined, &c.

And afterwards, to wit, on the fourth day of April, A. D. 1876, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the plaintiff, and assess the damages at eleven thousand nine hundred and fifty dollars ($11,950), with costs.

And afterwards, to wit, on the fifth day of April, A. D. 1876, the defendants, by their attorneys, come into court here and file reasons for a new trial, which being read, are as follows, to wit:

26 C. C. U. S. No. 19. Of April, '73.

MOULOR
vs.
AMER. LIFE INS. CO. } No. 19.

Reasons on behalf of defendants for a new trial, etc.

I. The verdict was against the evidence.
II. The verdict was against the weight of the evidence.
III. The verdict was against the charge of the learned court.

HENRY HAZLEHURST,
ISAAC HAZLEHURST,
For Def'ts.

(Endorsed:) No. 19. April sess., 1873. U. S. C. C. Moulor vs. Ins. Co. Reasons for a new trial. Filed April 5, 1876. Hazlehurst.

27 And afterwards, to wit, on the 15th day of April, A. D. 1876, before our said judges come the parties aforesaid by their attorneys aforesaid, upon which the record and matters aforesaid having been seen and by the court fully understood, and all and singular the premises having been examined, and mature deliberation being had thereon, and for it seems to the court now here that the verdict aforesaid should be set aside, and that a new trial ought to be had of the issues aforesaid.

And afterwards, to wit, on the second day of October, A. D. 1876, a jury being called, come, to wit:

1. John C. McCall.
2. Henry Fink.
3. James Raleigh.
4. Frederick A. Halteman.
5. George W. Voight.
6. Joseph M. Watts.
7. Jacob Roth.
8. Abner Rutherford.
9. Thomas Beardwood.
10. William Bovard.
11. Jacob N. Wunder.
12. James G. Osbourn.

Who are respectively sworn or affirmed to try the issue joined, &c.

28 And afterwards, to wit, on the day and year last mentioned, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the defendant.

And afterwards, to wit, on the 25th day of April, A. D. 1877, the plaintiff, by her attorney, comes into court here and presents her bond sur writ of error, which being approved, is filed, as follows, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania. April session, 1873.

EMELIE MOULOR, A CITIZEN OF THE STATE of Louisiana,
vs.
THE AMERICAN LIFE INSURANCE CO., A CORPORATION under the laws of Pennsylvania. } No. 19.

Know all men by these presents that we, Arthur Picolet and Jacob Adler, both of the city of Philadelphia, are firmly bound unto
29 the American Life Insurance Company, a corporation under the laws of Pennsylvania, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to which payment well and truly to be made we do bind and oblige ourselves, our heirs, executors and administrators, and every of them, jointly and severally, firmly by these presents, sealed with our seals, dated this 25th day of April, anno Domini one thousand eight hundred and seventy-seven (1877).

Whereas in the above-entitled suit a judgment was rendered against the above-named plaintiff Emilie Moulor, to which judgment a writ of error from the Supreme Court of the United States has been obtained by the said Emilie Moulor, the same being returnable to the second Monday of October, A. D. 1877:

Now, the condition of this obligation is such that if the said Emilie Moulor shall prosecute the said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the
30 above obligation to be void, else to remain in full force and virtue.

A. PICOLET,
416 *South 11th street.*
JACOB ADLER,
909 *Randolph st.*

Sealed and delivered in the presence of—
SAMUEL BELL.
WM. A. WILLIAMSON.

Approved. W. McKENNAN,
Circuit Judge.

(Endorsed:) No. 19. April sess., 1873. C. C. U. S. E. D., of Pa. Moulor vs. American Life Insurance Co. Bond sur. Writ of error. Filed April 25, 1877.

31 *Bill of exceptions.*

Be it remembered that at the October sessions, A. D. 1876, came Emilie Moulor, widow of Louis Moulor, late citizen of New Orleans, in the district of Louisiana, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded The American Life Insurance Company, of Philadelphia, in said eastern district of Pennsylvania, in a certain plea of debt, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city aforesaid, before the honorable William McKennan, circuit judge of said court, on Monday, the second day of October, A. D. 1876, the aforesaid issue between the said parties came to be tried by a jury of said dis-

trict, for that purpose duly impannelled (prout list of jurors), at which day came as well the said plaintiff as the said defendants by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff put in evidence a certain policy of insurance made and executed by the defendants under the hand of their president, attested by their secretary, dated Philadelphia, Pennsylvania, June 17th, 1872, and countersigned by John D. Scott, agent of the defendants for Louisiana, at New Orleans, July, 1872, No. 31916, for $10,000, for the term of the life of Louis Moulor, for the benefit of Mrs. Emilie Moulor (prout the same hereto annexed, marked Exhibit A.) And also the letters of Isaac Hazlehurst, esq'r, of Ap'l 9 & 21, 1873, admitting the fact of Louis Moulor's death; that the proofs of death were furnished in due form of law & within the prescribed period of time (prout the same hereto annexed, marked Exhibits B & C), and closed.

The defendants then gave in evidence the application signed by Louis Moulor, dated New Orleans, June 17, 1872, upon which said policy was issued (prout the same hereto annexed, marked Exhibit D).

32 Also the certificates of the two medical examiners of the said Louis Moulor, dated New Orleans, the 18th of June, 1872 (prout the same hereto annexed, marked Exhibit E.)

It was admitted that Louis Moulor died on the 3rd of Jan'y, 1873, and that the annual premium was paid as recited in the policy to the defendants in July, 1872.

And also a commission issued by this court to New Orleans, attested July 10, 1873, to New Orleans, and the return made to the same & read the deposition contained therein to the jury.

And also a second deposition issued by this court to New Orleans, attested Feb. 8, 1876, with the return, & read the deposition contained therein of the same deponent, Dr. Jules A. Mathieu, to the jury.

And closed.

Thereupon the pl'ff & def'ts submitted their points to the court & requested the judge to charge the jury upon them (prout the same hereto annexed, marked Exhibit F & G).

Whereupon he said:

I affirm the defendants' points, and I refuse the pl'ff's points, & I instruct the jury to find for the defendants.

33 EXHIBIT A.

No. 31916. $10,000. Age, 53.

AMERICAN LIFE INSURANCE COMPANY.

Charter perpetual. Incorporated 1850. Philadelphia.

All restrictions as to travel and residence removed.

This policy witnesseth that the American Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the payment to them in hand of four hundred and twenty-five .50 dollars, and of the further annual premium of four hundred and twenty-five .50 dollars, on the seventeenth day of June, in each and every year during the continuance of this policy, do insure the life of Louis Moulor, of New Orleans, in the parish of Orleans, State

of Louisiana, in the sum of ten thousand dollars for the term of his natural life.

And the said company do hereby promise and agree well and truly to pay, or caused to be paid, the said sum insured, at their office, in the city of Philadelphia, to Emilie, wife of said Louis Moulor, her executors, administrators, and assigns within sixty days after due notice and satisfactory proof of interest and of the death of the said Louis Moulor, deducting therefrom any indebtedness to the company and any un-
34 paid balance on the premium of the current year. Provided always, and it is hereby declared to be the true intent and meaning of this policy, and it is accepted by the assured upon these express conditions, that in case the said Louis Moulor shall, without the consent of this company previously obtained in writing, visit those parts of the United States w'ich lie south of 32 degrees north latitude, between the first of June and the first of November, or shall, without such previous written consent, enter into any military or naval service whatsoever (militia not in actual service excepted), or shall, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam-engine in any capacity, or as a conductor, brakeman, or hand upon a railroad, or as an officer, hand, or servant of any steam vessel, or in case he shall die by his own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium or other narcotic, or in the violation of any law of any of these States, or of the United States, or of any State or country, then this policy shall be void, null, and of no effect, except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon.

35 And it is hereby declared and agreed, that if the representations and answers made to this company, in the application for this policy upon the full faith of w'ich it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in such case, this policy shall be null and void; or in case the said premiums shall not be paid at or before 12 o'clock (noon) on the several days specified and appointed for the payment of the same, at the office of the company, in the city of Philadelphia, or to agents, when they produce receipts signed by the president or treasurer and with the corporate seal of the company, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease and determine, and all payments made shall be forfeited to the company; but after three or more full years' premiums have been paid hereon, the company will issue a paid-up policy payable at death, for about the amount of the premiums paid, provided application is made for the same, and the policy, while yet in force, be duly surrender to the company.

36 And it is also agreed, that this policy, and the insurance hereby effected, shall be subject to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were incorporated in this policy.

☞No assignment of this policy shall be of any force or effect unless approved by the company, and endorsed thereon by the secretary or other authorized officer, within thirty days from the date thereof; otherwise the premiums shall be considered sunk for the benefit of the company.

This policy shall not be valid until the actual payment of the premium has been made and receipted for at the bottom of this policy by the treasurer, or by John D. Scott, agent for Louisiana.

In witness whereof the president of the said American Life Insurance Company, on behalf of the board of trustees, has hereunto subscribed his name, attested by the secretary, and has caused the common seal of said company to be affixed, at the office in Philadelphia, this seventeenth day of June, eighteen hundred and seventy-two.

Attest:

[SEAL OF THE COMPANY.] GEORGE W. HILL, *President.*

JOHN I. WILSON, *Secretary.*

[U. S. revenue stamp.]

Received, New Orleans, July 1, '72, four hundred & twenty-five 50 dollars, being the first above named premium. John D. Scott, manager, La.

37 CONDITIONS.

I. Policies expire at noon on the last day of the period for w'ich payment has been made.

II. If a change takes place in the name or in the residence of the insured, notice of such change must be given to the company.

III. Agents are not authorized to make contracts for the company, nor to write upon the policy (except his signature when necessary to the first receipt of premium—see condition No. 5), nor to waive forfeiture of the same.

IV. In case of the assignment of a policy (whether as security or otherwise), satisfactory proofs of the amount of the assignee's interest in the insured life must be furnished with the proofs of death.

V. Receipts for premiums, excepting the first (to be found on the face of the policy), will invariably be given on a seperate paper, and will not be valid without the seal of the company.

38 PROOFS OF LOSS REQUIRED.

I. A certificate of the physician who attended the insured in his last illness, stating particularly the nature of the disease, its duration, and the date and hour of the decease; his apparent age, height, and complexion and general appearance.

II. Certificate of a friend or intimate acquaintance stating the disease of w'ich the party died, how long he was sick, a knowledge of such death, and how obtained, and the time of death.

III. Certificate of sexton or undertaker who superintended the funeral of insured, and saw his remains interred; stating apparent age, height, complexion and general appearance.

The said several certificates must be sworn or affirmed to before some magistrate, or public officer empowered to administer an oath, accompanied by a certificate, in conformity to the act of Congress, of the authority of the officer who administers the oath.

39 THE NECESSARY RECEIPT ON THE PAYMENT OF THE POLICY.

When it is a policy on the life of a husband for the benefit of a wife, or the life of a wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned policy, a receipt on the

policy from the party legally entitled to the payment is all that is required. But when a party insures his own life, in case of death the insurance must be collected by an executor or administrator legally authorized to the settle the estate, and the official certificate of his appointment by the proper tribunal to that effect must be presented at the office of the company, with the policy, duly receipted by said executor or administrator.

☞Acceptance of the premium due on this policy, by the company or its agents, after the day upon w'ich it is due, must be considered as acts of grace or courtesy, and in no wise to be construed as forming a precedent for future payments or a waiver of the forfeiture of the policy according to the conditions therein expressed if any future payment of premium be omitted on the day it falls due. The company will not be liable for any omission to notify the assured of the time when premiums fall due. Agents of the company are in no case authorized to make, alter or discharge contracts or waive forfeiture.

40 No. 31916. Ordinary life policy. Soint stock. American Life Insurance Co., Walnut st., S. E. cor. of Fourth, Philadelphia. Charter perpetual. Insurance on the life of Louis Moulor; amount $10,0000; date of policy, June 17th, 1872; term of life. Payments due on the seventeenth day of June, in each and every year; annual payment $425.50; United States tax on the policy 2.00 = $427.50.

Assignment.

For value received hereby tranfer and assign unto executors, administrators, and assigns all right, title, and interest in *in* this policy of insurance, and to the payments made therefore, and all benefit and advantage to be derived therefrom.

Witness hand and seal at this day of 187 .
[SEAL.]
Signed and delivered in presence of—

Approved day of 187 .

Sec't.

41 EXHIBIT B.

JAMES PARSONS, Esq.:

DEAR SIR: I am advised that the "proofs of death" of Louis Moulor furnished to the Amer. Life Ins. Co. under date of Jan. 16, 1873, are in due form of law.

I am, truly, y'rs,

J'S HAZLEHURST.

APRIL 9, 1873.

EXHIBIT C.

MOULOR
vs.
THE AMER. LIFE INS. CO.

508 WALNUT ST.

JAMES PARSONS, Esq.:

DEAR SIR: The sixty days have fully elapsed since the production of

the preliminary proofs in this case. The company deny all liability under the policy.

I am, res. y'rs,

J'S HAZLEHURST.

APRIL 21, 1873.

42 EXHIBIT D.

Application for insurance in the American Life Insurance Co., of Phila.

Statement of particulars respecting the person whose life is proposed for insurance, and which statement forms a part of the contract of insurance:

1. What is the name and residence of the person for whose benefit the insurance is to be effected? Write the name in full. Name, Emilie Moulor; residence, New Orleans, county of Orleans, State of La.

If a married woman or widow, what was her maiden name? Write Christian name in full. State relationship to the party proposed to be insured.

Married, Emilie Delcroix, wife & children.

2. What is the name, residence, and occupation or trade of the person whose life is proposed to be insured? Write all names in full. Name, Jean Bernard Moulor dit Louis Moulor. Occupation or trade, merchant; residence, New Orleans, county of Orleans, State of La.

3. Place and date of birth of the person whose life is proposed to be insured? Age next birthday? Place Genu, France, county of

43 State of ; date of birth, September 19th, 1819; 53 years.

Are the party's parents living; if so, how old? If not, at what age and of what disease did they die? State the father's name in full. Father died, aged about 72 years, of old age; mother died, aged about 65 years of, don't know. Francwa Moulor.

5. Has the party ever been addicted to the use of opium or other stimulants, or been intemperate in the use of alcoholic or other beverages? Are the party's habits now regular and temperate?—No; regular and temperate.

6. Has the party been successfully vaccinated?—He has.

7. Has the party ever been afflicted with any of the following diseases?—Answer yes or no to each. Insanity? No. Gout? No. Rheumatism? No. Palsy? No. Scrofula? No. Convulsions? No. Dropsy? No. Small-pox? No. Yellow fever? Yes. Fistula? No. Rupture? No. Asthma? No. Spitting of blood? No. Consumption? No. Any disease of the lungs or throat? No. Or of the heart? No. Or of the urinary organs? No.

8. Has the party experienced any wound, hurt, or other serious bodily injury? No.

9. Is the party now in good health, and does he usually enjoy good health? He does.

44 10. Has the party's father, mother, brothers, or sisters been afflicted with consumption or any other serious family disease, such as scrofula, insanity, &c., &c. No, not since childhood.

11. How many brothers and sisters of the party are now living, what the ages, and state of health; how many dead, at what ages and of what disease did they die? Sisters living; ages 4; health. Sisters dead; ages 2; disease don't know; died in Europe.

12. How long since the party was attended by a physician? For what disease or diseases? Not since the year 1847, when he had the yellow fever.

13. Give the name and residence of the party's usual medical attendant, and the name and residence of one intimate friend. Dr. Mathew, of New Orleans.

14. Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance
45 or information with which the company ought to be made acquainted? No.

15. Has any agent or company ever declined to insure the party? If so, what company? If now insured, state in what company or companies, and for what amount. No. Is now insured in the following companie viz: No, no, no, no, no, no.

16. Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fra'dulent answers or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon? Yes.

17. Sum to be insured? (Write words in full.) Ten thousand dollars. Premium payable annually. Table No. 6, premium $425.50.

18. Term for which the insurance is required? Life term.

19. What plan of insurance is desired? Stock plan.

It is hereby declared and warranted that the above are fair and true answers to the for'going questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein
46 made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealment of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid.

And it is further declared and agreed that in case the party to be insured shall die by his or her own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium, or other narcotic, or in the violation of any law of any of these States, or of the United States, or of any State or country, then said policy shall be void, null, and of no effect, except that in case he or she shall die by his or her own hand while
47 insane, the amount to be paid by the company on said policy shall be the amount of the premiums actually paid thereon.

And it is further declared and agreed that all and each of the several conditions and regulations of said policy, whether herein enumerated or not, shall be held and considered binding upon the company, as well as upon the party or parties hereto.

And it is further declared by the undersigned that the party making

this application has an "insurable interest" in the life above proposed for insurance to the full amount applied for.

Dated at this day of , 187 .

Witness.

A husband may sign for his wife, thus: "Mary Smith, by John Smith." Where insurance is for the benefit of minor children, it may be signed "John Smith, as guardian (or trustee) for Mary A., Susan G., and Chas. Smith, my children," or "children of ."

Where the policy is taken in the person's own name, one signature is sufficient. Write Christian names in full. Signature of the person or persons for whose benefit the insurance is to be effected. Signa-
48 ture of the person whose life is proposed to be insured.

Questions to be carefully answered (confidentially) by the family physician.

1. How long have you been acquainted with ?
2. Do you see h frequently? Have you given h medical attendance? If so, for what disease or diseases?
3. Has the party any constitutional infirmity or hereditary predisposition to disease, or is he subject to pulmonary complaints, or any other complaints or disease that tends to shorten life?
4. What is or has been the condition of the party's family as to constitutional vigor, health, &c.?
5. Do you know if he has been and is now regular and temperate in his habits?

Dated.

(Signature.)

Friend's certificate.

I certify that I have been personally acquainted with of during the last years, and do believe that his habits of living are temperate, and that he is now in good health, and does ordinarily enjoy good health; and that I know of no constitutional infirmity or other circumstance affecting h calculated to make an in-
49 surance on h life more than usually hazardous, except

Dated.

(Signature.)

EXHIBIT E.

Questions to be answered by the medical examiner of the American Life Insurance Company of Philadelphia respecting L. Mouler, whose life is proposed for insurance in the sum of $10,000 in an application dated Jan'y 17th, 1872.

A clear and explicit answer is to be given to each of the following questions, and the medical examiner is instructed to ask such other questions bearing upon the case as he may deem proper, and to give such other information as may be elicited thereby, and to make the examination in all respects thorough, exact, and circumstantial. He should carefully read the accompanying application for insurance before making the examination, and note any points in the same requiring special attention.

(The form of certificate of the personal or family physician of the per-

son examined is to be filled up and presented to the medical examiner, if he considers it requisite.)

The medical examiner should be particularly careful to ascer-
50 tain whether the answers to the questions in the application from the 5th to the 16th, inclusive, are correctly and understandingly given. If not, they are to be made so before proceeding with the examination. The signature of the person examined is to be attached in the presence of the medical examiner:

1. Description of the person examined. Height, 5 f't. In weight, 145 lbs. Figure. Temperament, sanguine. General appearance, healthy or unhealthy? healthy. Circumference of chest? Under forced expiration, 34½ inches; under forced inspiration, 36 inches. Other remarks.

2. Is the person examined dumb, or deaf, or blind (whether partially or wholly), or has he any natural or other infirmity or deformity? No. Loodosis, acquired when 14 years of age.

3. Has he ever resided out of the United States? State where and for what periods. Born in France.

Has he ever resided south of the southerly line of Tennesse? Is he acclimated to such residences, and how? Yes. Had yellow fever in 1847.

4. Are there any indications of disease of the head, external or internal? No.

51 Are there or have there ever been indications of any disease of the brain, or nervous system, as by vertigo, affected speech, irregular action of the muscles, or by affection of any kind? No.

Are there, or have there ever been any indications of insanity, or any mental disorder, or any tendency thereto, hereditary or acquired? No.

5. How many inspirations are there in a minute? 17.

Is the respiration full, free, distinct, and perfectly healthy in every part of both lungs? Yes.

Are the respiratory organs free from any suspicion of disease? Yes.

6. Is he free from any tendency to cough, catarrh, vitiated expectoration, spitting of blood, difficulty of breathing, or disease of the throat? Yes.

7. What are the rate, strength, and volume of the pulse? 78. Full. 10 f't. Regular.

Is the heart's action uniform, free, and unobstructed? Yes.

Are its sounds and impulses healthy? Yes.

Are the heart and blood-vessels free from any indications of disease? Yes.

52 Has he now or has he had any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? If the person has a rupture, he must wear a truss, and so state. No. No.

If a female, is she pregnant? How far gone, and whether first time or otherwise.

9. Has he experienced any severe injury? If so, state what, and its effects upon constitutional health? Loodosis, acquired when 14 years of age, but four years afterwards recovered completely from the consequences thereof.

Has he ever been affected by any severe constitutional disease? If so, state what, and its effects. No.

10. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? If so, state to what disease. No.

11. Do you believe him to be entirely free from any and every disease or disorder whatsoever? Yes.

12. Do you believe him to be strictly temperate and correct in his habits. Yes.

13. Do you consider him in all respects safely insurable? Yes, I do. Do you advise the risk? Yes, I do.

Signature of the person examined to be attached in the presence of the medical examiner.

53 Date of the above examination, at (place) New Orleans, on the 18 day of June, 1872.

(Signed) E. W. THURM, M. D.,
Medical Examiner.

Where graduated, Wurtzburg.
When graduated, 1862. 18 .

Agents are requested to give specific (confidential) answers to every one of these questions, and if they have anything else to state, on forwarding the application, they must communicate it to the office.

1. When did you last see the person whose life is proposed to be insured? Some time since.

2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly? Have known him well about 8 years.

3. Is he in a reputable situation of life, and of temperate habits? He is.

4. Do you consider his occupation or manner of living injurious to his health? No.

5. Do you believe that he is now in good health, and has a healthy constitution. Yes; asked Dr. Lewis particularly about case; says he is an excellent risk.

6. Are you aware of any particular circumstance touching his past or present health and habits of life which would make it un-
54 safe to insure his life? By a fall in his youth, but since I have known him has been a very healthy man.

7. Has his family to your knowledge been afflicted with pulmonary complaints or any other disease that tends to shorten life? Not as I can learn.

8. Do you consider him in all respects a proper person to be insured, and do you recommend him as such? I do; decidedly.

Dated June 18th, 1872.

JNO. D. SCOTT,
Gen'l Agent.

American Life Insurance Company, Walnut st., s. e. cor. Fourth, Phila.

Policy, No. .
Date of policy, .
Application dated .
Benefit of .
Residence, .
Life of .
Occupation, .
Age nearest birth-day, years.
Term of .
Sum insured, $.

Premium, $
Policy fee and U. S. Tax, $

$

Agent,
Residence,
N. B.—The agent is requested not to to fill up the above blanks

55 Questions to be answered by the medical examiner of the American Life Insurance Company, of Philadelphia, respecting Jean Bernard Maulor, or Louis Maulor, whose life is proposed for insurance in the sum of $10,000, in an application dated June 14th, 1872.

☞A clear and explicit answer to be given to each of the following questions, and the medical examiner is instructed to ask such other questions bearing upon the case as he may deem proper, and give such other information as may be elicited thereby; and to make the examination in all respects thorough, exact, and circumstantial. He should carefullly read the accompanying application for insurance before making the examination, and note any points in the same requiring special attention.

(The form of certificate of the personal or family physician of the person examined is to be filed up and presented to the medical examiner if he considers it requisite.

The medical examiner should be particularly careful to ascertain whether the answers to the questions in the application from the 5th to the 16th inclusive are correctly and understandingly given; if not, they should be made so before proceeding with the examination.

56 The signature of the person examined is to be attached in the presence of the medical examiner.

1. Description of the person examined: Height? 5 ft. — in.; weight? 145 lbs.; figure? stout; temperament? nervous; general appearance, healthy or unhealthy? healthy; circumference of the chest? under forced expiration, 34 inches; under forced inspiration, 36 inches. Other remarks.

2. Is the person examined dumb, or deaf, or blind (whether partially or wholly), or has he any natural or other infirmity or deformity? No; has double curvature spine.

3. Has he ever resided out of the United States? State where, and for what periods. Born in France.

Has he ever resided south of the southerly line of Tennessee? Is he acclimated to such residence, and how? Yes; yes; had yellow fever.

4. Are there any indications of disease of the head, external or internal? None.

Are there, or have there ever been, indications of any disease of the brain or nervous system, as by vertigo, affected speech, irregular action of the muscles, or by affections of any kind? No; no.

Are there, or have there ever been, any indications of insanity, or any mental disorder, or any tendency thereto, hereditary or acquired? No; no.

57 5. How many inspirations are there in a minute? 17.

Is the respiration full, free, distinct, and perfectly healthy in every part of both lungs? It is on the right side with ordinary respiration, and on the left with forced respiration.

Are the respiratory organs free from any suspicion of disease? Yes.

6. Is he free from any tendency to cough, catarrh, vitiated expiration, spitting of blood, difficulty of breathing, or disease of the throat? Yes.

7. What are the rate, strength, and volume of the pulse? 80: full, soft, normal.

Is the heart's action uniform, free, and unobstructed? It is.

Are its sounds and impulses healthy? Yes.

Are the heart and blood-vessels free from any indications of disease? Yes.

8. Has he now, or has he had, any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? If the person has a rupture he must wear a truss, and so state. No; no.

If a female, is she pregnant? How far gone; and whether first time or otherwise?

9. Has he experienced any severe injury? If so, state what,
58 and its effects upon constitution and health. Had a fall at 14 years of age, and was sick four or five years, with double curvature of the spine resulting.

Has he ever been affected by any severe constitutional disease? If so, state what, and its effects. None other than above. Has entirely recovered, and has the appearance of robust health now.

10. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? If so, state to what disease. None.

11. Do you believe him to be entirely free from any and every disease or disorder whatsoever? I do.

12. Do you believe him to be strictly temperate and correct in his habits? I do.

13. Do you consider him, in all respects, safely insurable? I do.

Do you advise the risk? Yes.

L. MOULER.

Signature of the person examined to be attached in the presence of the medical examiner.

Date of above examination at (place) New Orleans, La., on the 18th day of June, 1872.

(Signed) I. S. LEIDIS, M. D.,
Medical Examiner.

Where graduated, .
When graduated, , 18 .

Agents are requested to give specific (confidential) answers to every
59 one of these questions; and if they have anything else to state, on forwarding the application, they must communicate it to the office.

1. When did you last see the person whose life is proposed to be insured? This day.

2. Are you intimately acquainted with him? If not, have you obtained such information as will enable you to answer the following questions correctly? Have known him for 8 years.

3. Is he in a reputable situation of life, and of temperate habits? He is.

4. Do you consider his occupation, or manner of living, injurious to his health? No.

5. Do you believe that he is now in good health, and has a healthy constitution? I do.

6. Are you aware of any particular circumstance touching his past or present health and habits of life which would make it unsafe to insure his life? No.

7. Has his family to your knowledge been afflicted with pulmonary complaints, or any other disease that tends to shorten life? Not to my knowledge.

8. Do you consider him in all respects a proper person to be insured, and do you recommend him as such? I do.

Dated June 18th, 1872.

S. A. TUSKIN,
For Agent.

60 American Life Insurance Company, Walnut street, S. E. cor. Fourth, Philad'a. Policy No. 31916.

Date of policy, June 17th, 1872.
Application, dated " " "
Benefit of Emilie—wife.
Residence, New Orleans, La.
Life of Louis Moulor.
Occupation, merchant.
Age, nearest birthday, 53 years.
Term of life.
Sum insured, $10,000.
An'l premium, $425.50.
Policy, fee, and U. S. tax, 2 .
$
Agent, .
Residence, .

N. B. The agent is requested not to fill up the above blanks.

61 EXHIBIT F.

MOULOR
vs.
INS. CO.

Defendants' counsel request the learned court to charge as follows:

1. If the jury believe from the evidence that the answers to the fourth, eleventh, fourteenth and fifteenth particulars of the seventh question contained in the application were in any respect untrue or evasive or misrepresented or concealed any fact, then the policy is void and their verdict must be for the defendants.

2. If the jury believe from the evidence that the answer to the twelfth question contained in the application was in any respect untrue or evasive or misrepresented or concealed any facts, then the policy is void and the verdict must be for the defendants.

3. If the jury believe from the evidence that there were in the answers to any of the questions contained in the application any untrue or evasive statements or any misrepresentation or concealment of facts, whether the same were material or not to the risk of the insured, then the policy granted upon this application is null and void and their verdict

62 must be for the defendants.

4. If the jury believe from the evidence that the assured

63 EXHIBIT G.

Plff's points.

I. If it appears by the evidence that the insured did not know and could not know that he had any disease, his answer that he had none does not preclude a recovery in this policy.

II. If the evidence shows that the insured did not know and could not know that he had any disease, the representation contained in the answers, though construed as conditions precedent or warranties, are not untrue in any respect according to the meaning of the policy.

III. The answers to questions 12 & 13 in the application must be taken together & may bear the meaning that the insured had not been attended by a physician for a special disease or diseases since 1847, though he had been attended by a physician for general advise or treatment by way of preventing rather than curing disease.

IV. The jury are entitled under the evidence to find as a fact according to the certificates or reports of the def'ts' agents and medical examiners that Louis Moulor did not have any affection which in ordinary parlance reaches the gravity of a disease.

V. The testimony of Dr. M'thew must be regarded as adverse upon the point of Moulor's health to pl'ff & if the admissions contained
64 in it can be reconciled with the other evidence they will be interpreted as extorted from a reluctant witness in aid of a consistent theory of the evidence as a whole.

VI. The terms of the policy are not the language of Moulor but the phraseology of the def't, & if an ambiguity or difference exists in the language, the insured is entitled to take and the court will give the interpretation which is most favorable to him.

VII. Unless the fact of Moulor's disease was known to him, or he had the means of knowing its existence, his denial will be construed with reference to his conviction & not be converted into a warranty against the existence of disease.

VIII. To make the insured warrant the non-existence of diseases which are inaccessible to his consciousness, the warranty must not be wrapped up in general language but must be put in a form which will bring home to the insured the plain meaning that he stakes his interest in the policy upon the non-existence of unknown diseases.

IX. The policy sued upon in this case is a contract which was made to be performed in Pennsylvania, & its construction must be governed by the law of Pennsylvania.

X. If there is any difference in the interpretation of policies of
65 life insurance between the U. S. courts & the courts of Pennsylvania, the distinction taken by the Pennsylvania courts must prevail in the construction of a Pennsylvania contract.

XI. That the question of warranty is not raised under the pleadings in this case & that the pl'ff is not precluded from recovery unless she or the insured made a statement which was not only untrue in fact but was also known at the time by her or by the insured to be false, or at least having the means of knowing the statement to be false.

Refused.

66 And thereupon the counsel for the said pl'ff did then and there except to the aforesaid refusal, charge, and opinion of the said court; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record, the said counsel for the said pl'ff did then and there

tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 6th day of October, A. D. 1876.

[L. S.] (Signed) W. McKENNAN.

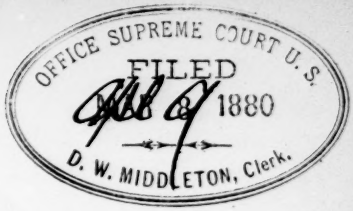
67 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Moulor vs. American Life Insurance Company, No. 19, April session, 1873, on file, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of these United States the 102nd.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) No. 255. Emilie Moulor, pl'ff in error vs. The American Life Insurance Company. E. Pennsylvania, C. C. U. S. Filed 9th October, 1877.



Emilie Moulor,

vs.

Am. Life Ins. Company.

Statement of the Case. - - - - - - - - - 1
Assignments of Error, - - - - - - - - - 10
Argument:
- *Admissions and Counter-Admissions,* - - - - - 11
- *Dr.'s attendance.* 13; *Knowledge.* 15; *Adverseness,* - - 16
- Truthfulness *of answers,* 18. *warranted; not* facts *unless* expr'ly 21
- *Answers are mental re-presentations,* - - - - - 31
- *Judg't by S. C. for pl'ff.* 33; *Pa. law governs contract,* - 35

Appendix, - - - - - - - - - - - 41

In the Supreme Court of the United States.

No. 255, OF OCTOBER TERM, 1879.

Emilie Moulor,

PLAINTIFF BELOW AND PLAINTIFF IN ERROR,

vs.

Am. Life Ins. Company,

DEFENDANT IN ERROR AND DEFENDANT BELOW.

—o—

BRIEF FOR PLAINTIFF IN ERROR.

—o—

I. Statement of the Case.

Action of Debt upon a policy of life insurance under seal, originally brought in the United States Circuit Court for the Eastern District of Pennsylvania by the plaintiff, a citizen of the State of Louisiana, against the defendant, a corporation and a citizen of the State of Pennsylvania.

The policy, No. 31,916, was dated the 17th of June, 1872, at Philadelphia, signed by the President, George N. Hill, attested by the Secretary, John S. Wilson, and countersigned by Jno. D. Scott, La. manager, for $10,000 upon the life of Louis Moulor, of New Orleans, Louisiana, for the term of his life, in consideration of $425.50. paid to the defendant by said Louis Moulor for the benefit of Emilie Moulor, his wife, and of the annual premium of a like amount.*

At the first trial, on the 16th of April, 1874, the production in evidence by the defendants of the application disclosed an apparent falsehood on the part of the insured. He seems to be racked and riddled with disease at the very moment he "doth profess too much" his exuberance of health. The plaintiff, on account of his surprise at this collision of contradictories, was allowed to withdraw a juror. The defendants then abandoned their original defence of suicide, and not content with the general issue of *nil debet*, already pleaded on the 5th of June, 1873;† which plea challenged the plaintiff's recovery on any ground, they set up the plaintiff's fraud in making his answers. The additional pleas were filed the 17th of March, 1876, in order to raise the issue of false representation by the plaintiff.‡ His contention that the charge of fraud was inconsistent, and could not stand with honesty of conviction, was overruled. Warranty, it was held, apart from false representation, remained at issue under the plea of *nil debet*.

*Record, original pages 33–40.
†Record, original pages 21–2.
‡Record, original pages 23–24.

The case was re-tried the 4th of April, 1876. The jury, being the judges of the truth or falsehood of the insured's answers, settled the fact upon the evidence submitted to them, negatived the false representation and disease imputed to the plaintiff, and established the truthfulness of his answers by their verdict, which was rendered for the plaintiff in the sum of $11,950 and costs.§

The learned Judge was dissatisfied with the verdict; he conceived that the jury had usurped his function and decided the law of the contract. In his mind, the jury meant by their verdict to find that Moulor did not know, and could not know, he had any disease, but on the contrary believed himself to be sound, if not robust in health. What they negatived was intentional or conscious untruth. They vindicated the plaintiff from the charge of false representation. They could not exonerate him from the breach of his warranty. The learned Judge assumed that the doctor's testimony was an admission and proof of Moulor's being diseased. The explanation of the evidence and the denial of anything amounting to disease, though sanctioned by the jury, did not find favor in the Judge's sight. He adjudicated the existence of disease in Moulor, in spite of the jury. The verdict said: It is found that there is no falsehood or untruth in the plaintiff's answers. Twist the contract in law as you please, make it a warranty or a representation, the facts fit either dilemma. If a representation, the plaintiff, if he had any disease, didn't

§Record, original page 25.

know of it; if a warranty, he didn't have any disease, and that's an end of it.

The court nevertheless, the 15th of April, 1876, set aside the verdict and granted the defendants a new trial.|| Upon the third trial, the 2d of October, 1876, the learned Judge gave the jury, upon the evidence submitted at the former trial a binding charge to find for the defendants,* which *eo die* was found by a verdict.†

The binding charge of the court constitutes the cause for the present writ of error.

Was the policy a warranty? The policy is based upon the insured's *representations*. It declares that if the *representations* and answers . . in the application upon "the full faith of which it is issued, shall be found to be "untrue in any respect, or that there has been any con- "cealment of facts," the policy shall be null and void.§ There is no condition of *warranty* attached by the policy to the facts stated by the insured. The application makes the insured *agree* that if in any of his answers there should be "any untrue or evasive statements, or any misrepre- "sentation, or concealment of facts,"° or the defendant should afterwards discover that any of the answers "are "untrue or evasive, or that there has been any conceal- "ment of facts,"¶ the policy should be void. The applicant is made to review his answers and agree upon the understanding "that any untrue and fraudulent answers,

||Record, original page 27.
*Record, original page 32.
†Record, original page 28.
§Record, original page 35.
°Record, original pages 45–6.
¶Record, original page 46.

" or any suppression of facts in regard to health"* should vitiate the policy.

The additional pleas filed by the defendant, the 17th of March, 1876, in order to raise the issue of a *false representation*, aver and rely upon the insured's *fraud* in making his answers.

The commission of 1873,† issued by plaintiff to explain the suicide, gave the witness, Dr. Mathieu, his opportunity, and in answer to the 5th cross-question: "Had you attended him (the insured) before his death? "How long, and for what disease? When did you "first visit him, and for what cause?" he gave his vanity full vent, as follows: "I had attended him as "his physician since 1855 for chronic asthma, mani- "festations of the first stage of consumption; this was "in 1858 and 1859; afterwards for slight indispositions "from time to time, besides the asthma, to which he "was constitutionally subject. I also treated him for "scrofula all the time. The last disease for which I "was called previous to his death was on the occasion "of the pains in the head, of which he suffered in the "night from December 31, 1872, to January 1, 1873. "My first visit to him as a physician was in 1855, for "asthma."‡

When re-examined, by the commission of 1876,§ Dr. Mathieu explains himself thus: "I knew him (the in- "sured), and have known him since 1854. . . As to his "general constitution, I will state that he was delicate.

*Record, original page 45.
†Appendix, pages 7–20.
‡Appendix, page 17, lines 20–29.
§Appendix, pages 20–6.

"I treated him for scrofula, for the first symptoms of "consumption, and for asthma, but *he never learned "from me, nor from any other physician in this city, nor "did he suspicion or have the remotest idea that he was "affected with any of such diseases himself; on the con- "trary, he always boasted and prided himself as being a "strong, healthy and robust man.* The asthma he had "was the dry nervous, no expectoration connected "therewith to make the patient believe he did have it. "As to the first stage of consumption, there was no "softening of the tubercles, and therefore no expecto- "ration of tuberculous matter. As to the scrofula, I "will state that his was very mild diathesis. *I did not "impart to said Moulor a knowledge that he was affected "with any of said three before mentioned diseases out of a "feeling of humanity, a rule I never deviate from in my "practice, whenever the mind of the patient might be "affected thereby.* The company, defendant, was "aware at the time they accepted Mr. Moulor that I "was his family physician, and his, and had I been ap- "plied to for information as to his general health and "constitution, or requested to fill out one of the usual "blanks of examination by a physician, I certainly would "have stated and made known that he had been affected "with the diseases I have before mentioned. I have "never been absent from, nor ceased practicing my pro- "fession, in this city since 1854. *My name was fur- "nished company defendant by Mr. Moulor, in writing, "as his physician, thus enabling the company to get all*

"*desirable information from the proper source, which in-*
"*formation thought proper neglecting to procure.*"*

The medical examiner at New Orleans is instructed by the defendant "to ask such other (than the printed "formulas) questions bearing upon the case, as he "may deem proper, and to *give any such further in-*"*formation* as may be elicited thereby; and to make "the *examination* in *all* respects *thorough, exact* and "*circumstantial.*"† The examiner must understand the application before he undertakes to make his examination, and he must also see that the applicant appreciates the full import of the printed questions put by the company. The questions are to be explained by the examiner, and the answers taken down in his presence.‡ The examiner is required to procure the certificate of the applicant's family physician, unless the examiner is satisfied without it by his own examination. The certificate must be presented "*if he consid-*"*ers it requisite.*"§ What does the first medical expert of the defendant testify under these instructions? That the insured was "*healthy*" in "*appearance.*"‖ "He has 17 inspirations in a minute." His "*respira-*"*tion*" was "*full, free, distinct* and *perfectly healthy in* "*every part of both lungs.*" "The *respiratory organs*" were "free from any *suspicion* of disease." He was "free from any *tendency* to cough, catarrh, vitiated ex-"pectoration, spitting of blood, *difficulty of breathing* "or *disease* of the *throat.*"¶ He did not have "any *pre-*

*Appendix, page 23, lines 21 & 28–31, & the entire page 24.
†Record, original page 49.
‡Record, original pages 49–50.
§Record, original page 49.
‖Record, original page 50.
¶Record, original page 51.

"*disposition*, whether hereditary or acquired, to *any* "*constitutional* disease."* Accordingly the examiner said: "I do believe him to be entirely free from *any* "and *every disease* or *disorder whatsoever*." I "do con- "sider him *in all respects safely insurable*." I "do *ad-* "*vise* the *risk*."† This is the testimony of E. W. Thurm, who was graduated a physician at Wurtsburg, Germany, in 1862, and who is the defendant's witness.‡ The second medical examiner of the defendant, under the same instructions,§ testifies: the insured "has the "appearance of *robust* health now." He has "17 inspi- "rations in a minute." His "respiration is *full, free, dis-* "*tinct* and *perfectly healthy* on the *right* side, with *ordi-* "*nary* respiration, and on the *left* with *forced* respiration." "The *respiratory organs* are *free* from *any suspicion* of "disease." "He is *free* from *any tendency* to cough, "catarrh, vitiated expectoration, spitting of blood, *diffi-* "*culty* of *breathing* or *disease of the throat*."|| He has "no *predisposition*, whether hereditary or acquired, to "*any constitutional* disease." "I do believe him to be "*entirely free* from *any* and *every* disease or *disorder* "*whatsoever*." "I do consider him *in all respects safely* "*insurable*." "I *advise* the risk."§ This is the testimony of Dr. J. S. Lewis, the defendant's second medical witness, who was particularly consulted upon the case, and pronounced the insured "an *excellent risk*."¶

What do the defendant's *agents* at New Orleans *report?* They are requested to exhaust their knowledge

*Record, original page 52.
†Record, original page 52.
‡Record, original page 53.
§Record, original pages 55–6.
||Record, original page 57.
§Record, original page 58.
¶Record, original page 53.

and communicate it to the company. John D. Scott, the general agent says: "I have known him (the in-"sured) *well* about *eight* years." "I do believe that he "is now in good health, and has a healthy constitution: "*asked Dr. Lewis particularly about his case. Says he "is an excellent risk.*"* . . . "Since I have known him "he has been *a very healthy* man." His family has "not, *as I can learn*, been afflicted with *pulmonary* "complaints, or *any other* disease that tends to shorten "life." "I *do decidedly* consider him in *all respects* a "*proper* person to be insured, and do *recommend* him as "such."† S. A. Taskins, the defendant's other New Orleans agent, testifies that he saw the insured *this* day, viz: June 18th, 1872, the date of his report. "I "have known him for *eight* years." "I do believe that "he is now in *good health*, and has a *healthy constitu-"tion.*" His family has "*not, to my knowledge*, been af-"flicted with *pulmonary* complaints, or *any other* disease "that tends to shorten life." "I do consider him *in all "respects* a *proper* person to be insured, and *recommend* "him as such."‡

*Record, original page 53.
†Record, original page 54.
‡Record, original page 59.

II. Assignments of Error.

The plaintiff assigns for error,

THAT:

1st. The learned Judge erred in giving the jury a binding charge to find for the defendant.

2nd. The Circuit Court erred in entering judgment upon the verdict for the defendant.

3rd. The Circuit Court erred in not entering judgment for the plaintiff.

JAMES PARSONS,
Attorney for Plaintiff.

III. Argument.

Was the insured afflicted with anything which amounted to the gravity of a disease?*

The learned Judge below evidently considered Dr. Mathieu's testimony an *admission*, and therefore *proof* that the insured was diseased. By this method of jumping to a conclusion, the *admissions* of the defendant's medical examiners in their *certificates*, and of the defendant's agents in their *reports*, would negative the 'admission' of Dr. Mathieu *four* times over. The medical certificates, which accompany the application, are decided to be competent evidence.†

The certificate of the examining physician of a life insurance company is evidence of its recitals, and is conclusive, unless the opinion was influenced by fraudulent representations or concealment of material facts.

"The defendants must be estopped from denying the "competency of the physician selected to make the ex- "amination, the physician being the agent of the defend- "ant, and not of the plaintiff."‡

*The degree of ill-health which constitutes disease is a fact for the jury. Cushman v. U. S. Life, 70 N. Y., 72.

†Ins. Co. v. Mahone, 21 Wall, 152.

‡Hallman v. Life Ins., 1 Wood, U. S. C. C. R., 677.

Plaintiff offered in evidence Statement of the agent who effected the insurance. The objection to its admission was overruled, and the ruling was sustained. "It was not error to admit the statements of Dr. Dean, "the defendant's examining physician, and Holmes, their "agent at Rochester. These were parts of the papers "on which the policy was issued, and as the defendants "themselves had introduced the other papers, being all, "except the statements of the agents, and made them "part of the evidence in the case, there was no impro- "priety under such circumstances that all the papers "should appear in the case. It was the *right* of the "*plaintiff* to lay before the jury *all* the *papers on which* "the *company acted* when it decided to grant the policy."* The reports of the defendant's agents, who effected the insurance, embody the transaction itself. The agents of a corporation are the only actors in the negotiation. Their reports are not only admissions against the defendant; they constitute the transaction and become the *acts* of the corporation. The defendants are bound by their admission which negatived any disease in the insured as an estoppel. The agent personifies his principal, although he speaks in the character of the insured.† If the agent's declarations are a part of the *res gestæ*, they bind the company; that is, if they are

*Rawls v. Am. Mut. Life Ins. Co., 27 N. Y., 282

†Ins. Co. v. Wilkinson, 13 Wall., 222; N. J. Mu. Life v. Baker, 4 Otto, 610

so immediately connected with the insurance as to form part of its history.* The agent binds the company by his own statements, though put by him in the insured's mouth.† A condition that the agent shall be considered the agent of the insured will not relieve the company.‡

The principal is bound not only by the express statements, but by the *notice* contained in the agent's report. He communicated an offer for $4000 insurance, stating that if the company did not wish to take that amount, he could insure part in a different company. The principal declined $4000, but granted a policy for $3000. The defence to the policy was, that the additional $1000 insurance effected in a different company was not notified at once as required by the policy. The report of the agent was *notice by implication*, and bound the company as evidence of compliance with the policy.‖

But the question is not to be decided in this off-hand way by a set-off of admissions which exclude a thorough investigation.

The preliminary falsehood imputed to the insured is contained in his answer to the 12th question in the

*Bigley v. Williams, 30 P. F. Smith, 107; Northwestern Mutual Life v. Roth, 6 Norris, 409; Mutual Benefit Life v. Cannon, 48 Ind'a, 264; Dean v. Aetna, 5 Big. (N. Y. App'ls), 377; Hoffman v. John Hancock Mutual Life 5 Big., 593; Ins. Co. v. McCain, 6 Otto, 84.

†Flynn v. Life Assurance Society, 7 Hun., 387.

‡Southern Law Review, Dec. and Jan. Nos., 1879–80.

‖Farmers Mu. Ins. Co. v. Taylor, 23 P. F. Smith, 342.

application: "How long since the party was attended "by a physician?" "For what disease or diseases?" Answer: "Not since the year 1847, when he had the "yellow fever." Question 13, "Give the name of the "party's usual medical attendant." Answer: "Doctor "Mathieu of New Orleans."

The answers to questions 12 and 13 in the application must be taken together, and may bear the meaning that the insured had not been attended by a physician for a specific disease or diseases since 1847, although he had been attended during the time by a physician. The absence of any specific disease explains the answer that he had not been attended for any disease since he had been attended in 1847 for yellow fever. But he does not deny general medical attendance since that date, nor that such attendance was habitual and constant on the part of Dr. Mathieu; on the contrary, the insured's statement suggests an uninterrupted medical attendance. "Dr. Mathieu is "my *usual* medical attendant," that means not only habitual, but frequent and regular attendant. The two answers so far from being inconsistent with each other and with the facts of the case, serve to complement each other and at the same time explain the testimony. A general regimen of hygiene is indicated to avoid the proneness to disease, on the true principle that

prevention is better than cure. A chinese doctor is paid for prevention, and is held accountable for disease.

No disease exists, and therefore the answers are not only consistent with each other, but interpret by their juxtaposition the significance which each carries with it. Attendant means in one's train, a regular follower. Not an occasional visitor, but a steady, constant one. A "usual attendant" intensifies by both words the unbroken regularity of the visitation.

The reference by the insured to his family doctor gave the company the means of obtaining all the information they wished. This put them in the position of knowing more than he did, and estops them from relying upon what *he* might know, because his answer is *supplemented* by his *Dr.'s knowledge* and must be taken with reference to what the expert, whom he has invoked to aid him in telling the company his condition, *would have said*. The option of the company to rely upon their own independent diagnosis was the deliberate choice of their agents, who were *required* by the delegation to elect *whether* or *not* to call in the insured's family doctor, and the company is bound by the election which they have made.* The doctor was always ready and on hand to testify.†

On the main question, whether the insured *had*, or had had any of the three diseases, consumption, scrof-

*Higgins v. Phœnix Mutual Life, 74 N. Y.,6.
†Appendix, page 24, lines 16–28.

ula or asthma, the burden is on the defendants. They must make out by clear evidence that the insured did have them.*

Before Doctor Mathieu's testimony is taken into consideration, his position as a witness must be fixed. The original commission was issued by the plaintiff, to examine him upon the insured's suicide. The cross-examination developed a new and independent point, the insured's falsehood in speaking of his health. The plaintiff was surprised by this unexpected turn, given to the case by Doctor Mathieu's evidence, and issued a second commission to explain his testimony. The plaintiff, however, used neither deposition, as the defendant, and not he, was trying to make out the falsehood. The defendant could not use the testimony as an admission without taking the explanation which qualified and formed part of it.† And the defendant accordingly put both commissions in evidence.‡

Doctor Mathieu became their witness. "At the trial "he is *necessarily* the witness *of* the *party* who *reads his* "*deposition*, the case would present the strange spectacle "of a party offering his own witness with the benefit of "a cross-examination, which is *denied* to the party against "whom he is offered. The latter may have *declined to*

*Campbell v. N. E. Ins. Co. 98 Mass. 381. Piedmont & Arlington Life v. Ewing 2 Otto 377.

†Mutual Benefit Life Ins. Co. v. Newton 22 Wall., 32.

‡Record, Original page 32.

"*use* the *deposition*. . . . He has *conducted* the *exami-*
"*nation with* a *view* only *to particular facts;* in the
"course of which *other* facts which he was not apprised
"of as being considered important by the other side, are
"*spoken of* in a way that he afterwards finds *prejudicial*
"to him. Now as to these, he is led into a surprise
"which he would have avoided, if his attention had been
led to them by a direct examination from the other
"side."* The judge in a recent case suggests a thorough cross-examination to protect the parties thus surprised. Afterwards if the disposition is used by the opposite party it will be at least equal and fair to both sides, who have then both cross-examined.†

Doctor Mathieu's statements must be taken as *adverse*. What he admits in the plaintiffs favor, the *non-existence* of diseases, but only *predispositions*, must be accepted as the true import of his testimony. This would be the interpretation on the theory of evidence. But the construction does not depend for its validity upon theory; it coincides with and corroborates the evidence of the other medical experts of the insured, and of the defendant's agents. The testimony of the clairvoyant, Doctor Mathieu, must be interpreted in connection with the judgment of the two other medical examiners, of the insured, and of the defendant's

*Gordon v. Little, 8 S. & R., 555.
†Martin v. Dearie, 9 Phil. R. 186.

agents, all of whom were examined upon the point. Doctor Mathieu's transcendental theories and practice of medicine are best explained by himself. Without a knowledge of his divination the testimony which he gave would be inconsistent with every particle of evidence in the case. But, judging him by his own standard, his testimony agrees with the other witnesses, and admits that the insured had *no* disease. The germs or embryos which the Doctor saw in his mind's eye, were invisible to any other doctor, and were undreamt of by the insured. If, therefore, Doctor Mathieu's testimony is brought down to tangible realities, as he declares in his deposition that it should be, and interpreted in aid of a consistent theory of the evidence as a whole, his testimony can be reconciled and stand with the other evidence, which in its agregate force negatives any disease. If, on the other hand, his testimony should be isolated, and treated as proving anything by itself, its extent would be that the insured, if he had any vestige of disease, neither knew it or could have known it.

The application makes the insured *declare* and warrant his *answers* to be "*fair* and true." The answers are equivalent to representations and are so classified throughout the policy and application. There is no *warranty* of the *facts* asserted in the answers.

The only way in which an answer about a fact inaccessible to consciousness can be *absolutely* true in *every* sense and false in *none*, is by making the words fit and cover the thought in the mind. The words are true because they convey with exactness to others the contents of the mind. Let the mind attempt to express in language what it does not possess, and the words become false. I am asked if I have consumption, and without any knowledge of the fact, and with every reason to believe that I have no such disease, I reply: Yes. Is that true? It is false, because I state what I neither know nor believe; false in law, because I do not know what I affirm; and false in reality, because I state the contrary of what I actually believe. It might turn out that I had consumption at the moment when I said so, though I did not or could not know it; would this make my answer true? It would none the less be a lie, but the accidental coincidence of a disease with my reckless or wilful assertion of it, saves me from the consequences of a falsehood. A lucky hit by haphazard saves me from an indictment for purjury. The law does not punish the crime unless the fraudulent intent, evidenced by deliberate or reckless disregard of truth, is consummated by the overt act. Had the fact turned out as I believed, the statement would have been false, and I would have been guilty of purjury and punished. The guilt is the same in both

cases, but the law requires both the guilty intent and the embodiment of it in act to concur. By chance a stray act intervenes and frustrates the consummation of the intention. Is the element of crime to be found in the accident? It is, on the contrary, to be lodged in the guilty intention, where morals puts it. *Actio recta non erit, nisi recta fuerit voluntas.** But the law says I recognize no crime until the guilt is proved by external circumstances. It exists, but I do not punish it until manifested.

To speak the truth according to one's conviction does not, if the belief is an error, convert the martyrs for conscience' sake into liars. Truth telling is speaking from conviction. If truth is independent of conviction and depends on chance, an inveterate liar might be a model of truthfullness. The insured is forced into a dilemma on this theory from which there is no escape. If he speaks according to his knowledge and conviction, he may be in error and the insurers claim a liar. If he disregards his knowledge and his conscience, and answers at random, he lies again. He might, if he knew the trap, avoid it by saying: I don't know whether I have any disease or not; if I have, it is latent, and has given no symptom of its existence. The insurers give him no such loop-hole. They have cornered him, and don't mean to let him

*S. Ep., 95.

escape. They *make* him answer, *Yes* or *No, by express command*, and leave *no space* in their blanks for a *longer* reply.

Were the answers warranties by the insured or representations?

The terms of the policy are not the language of the insured, but the phraseology of the defendant. If there is an ambiguity or difference of meaning in the language, the insured is entitled to take, and the court will accordingly give, the interpretation which is most favorable to him. The meaning of the contract is determined by the sense which he understood it to convey. The defendant created the twofold aspect, and is bound by either meaning which the insured accepted.* Moreover the construction of the language must be *against* the defendant, who dictated the terms of the policy.†

Hence the terms of the contract must cover an *express* warranty against the risk.

The policy does not contain the word "warrant," and the application, which could create no *independent* liability but must be brought into the class of representations by the *limitation* of the policy itself, employs it but once.

Warranty and truth are incongruous ideas. Truth

*Throop's Verbal Agreements, § 188.
†National Bank v. Ins. Co., 5 Otto, 673.

refers to conviction; warranty relates to the existence or non-existence of facts, which are independent of the mind. The truth of a *statement* or *answer*, therefore, *necessarily* implies a representation, and cannot relate to a warranty. The choice and collocation of words by the insurers indicate that they meant to recognize the distinction, and make *intention* the test of veracity. Representation is the sole definition of the policy, and is made the *consideration* and *basis* of the contract. The application says, if representations *and* answers are untrue in any respect, if any untrue or *evasive* statement or misrepresentation in the answers, or any untrue or *fraudulent* answers, the policy shall become void. These phrases are coupled in each instance with the *concealment* or *suppression* of facts. The answers are declared and warranted to be *fair* and true. Good faith or sincerity, is the condition upon which the insurers insisted. The various clauses are *ejusdem generis* and exclude *intentional* untruth.

The application contained a declaration that the answers were warranties, and if not in *all* respects true and *correct*, the policy should be void. The *policy* made the insured's statements and declarations *warranties* which should be *in all respects true*. "Although "the term warranty is used in *both* instruments, it must "be construed with reference to the other language "employed in the same instruments. These instruments

"were prepared by the defendant, and themselves explain "the degree of responsibility to be assumed by the ap- "plicant in answering the questions propounded to him. "Although the word warranty is employed, yet if the "explanations accompanying that term show that a "strict warranty was not intended, these explanations "given by the defendant itself in the papers, and which "induced the applicant to undertake to answer the "questions and enter into the contract, must govern."*

As the other language of the document implied *false* statements *with intention*, the incongruous idea of a warranty was merged in the general drift of the meaning, and interpreted according to the design or intention embodied in the complicated net-work of provisions.*

If the defendant meant to make the insured warrant himself against disease, which he could not by any searching find out, how could the Company do it?

The meaning could not be left to inference, but the *fact* of disease as a physical incident may be the subject of a warranty. A wager may be made about any external event or circumstance. So long as the fact is either known, or if not known, its existence or non-existence is equally accessible to both parties, the wagering has a natural basis, and is not inherently improbable. The cases which make the insured war-

*Fitch v. Am. Popular Life Ins. Co., 59 N. Y., 557.

rant the facts of disease which are manifest and open to observation, or which are revealed by symptoms intelligible to the mind, are not to be confounded with the class which relates to unheralded and unknowable diseases.* The insurers take risks because it is the business they are engaged in. The representations, conditions and warranties are designed to extort from the insured all that he knows, or all that he can find out about himself. The insurers put him under pressure in order to force out of him the information which enables them to act advisedly. This is entirely consistent with the plan of insurance. But the limit is reached when the insured's means and resources of knowledge are exhausted. Then his part is done. To turn around and reverse the position of the parties, in order to convert him into an insurer of his insurers, is a subversion of the contract of insurance. If a counter-policy is to be set up by construction under the original insurance, how are the terms to be made out?

If the contract meant to make an unknown disease forfeit the claim, the language should have expressed that meaning. The question might have been put

*Insured denied the *fact* that he had been ruptured, and *falsified* his age. Ætna Life Ins. v. France, 1 Otto, 510. Insured denied the *fact* that he was married, and asserted the fact that he was single; denied that he had applied for insurance to another company, although he had in fact obtained $10,000 insurance in a different company. Jeffries v. Life Ins. 22 Wall. 47. A consumptive denied that he had ever had consumption, spitting of blood, or disease of the lungs, and he also denied that he had a physician. Foot v. Ætna Life Ins., 61 N. Y., 571.

thus: Do you stake your interest in this policy upon the non-existence of consumption in your system? Do you bet the sum insured against nothing, that vivisection wouldn't disclose consumption? Do you mean to give me gratis, without a premium, a counter-insurance against the death-risk, which I pretend to have taken? If you die from any disease which I have enumerated, and I have mentioned all I could think of, I get rid of my bargain, although I hold you fast to yours. If you knew you had the disease, the attempt to impose the risk on me is a fraud; if you did not know, then you took the risk instead of me. I have set up my little game; it works on the principle of heads I win, tails you lose. I warrant myself disease-proof or death-proof. No wonder the Scotch judges say that this is impious! An insult to the Almighty!

The defence to an action on a life policy was a breach of the warranty by the insured contained in her declarations and statements, which she made a condition precedent to her right of recovery. She said she was in good health, and denied, in answer to a question, that she had *any disease*, or symptom of disease, although she died within six months, of a disease of the liver, which resulted in dropsy. The company claimed the right to an issue, in order to prove by a verdict that at the date of the insurance such a disease existed in the constitution of the insured, whether

she knew it, or could possibly have known of its existence. The legal import and extent of the condition were contained in the proposal and the declaration of the insured, that she had no disease. Said the Lord President: "If I thought the view pressed by the insur-"ance company was law, I should say there was an end "to all life insurance in time to come. But I conceive "that the doctrine of warranty is pushed by them to an "extravagant length. Though there are equivocal "expressions in the authorities, I think it is impossible "that it could be meant in any of them to be laid down, "that what is called a *warranty in regard to the person* "*effecting* an *insurance*, is more than a warranty of "*what was known to the person*, or *should have been* "*known, unless* he was *guilty* of gross and *inexcusable* "*negligence*. I think it is *impossible to conceive* that the "warranty goes farther. The doctrine pressed by the "insurance company just amounts to this, that when a "person dies, a *post mortem* is warranted, and if any-"thing should be found that indicates an *incipient latent* "disease, though there were *never* any symptoms, and "there is no indication of fraud or gross negligence, "there is a breach of the warrandice, which voids the "insurance. I can arrive at no such conclusion. Such "a doctrine is not deducible from the *strongest* of the "authorities. If a person is not guilty of any negligence "in acquiring knowledge of his own condition; if this

"is not established, there is *no breach* of *warranty*. It "appears to me extravagant that an insurance may be "voided upon an inquisitorial investigation into latent "evils in the constitution of the party, who has no "indication of disease at the time of the insurance; upon "a latent defect in the constitution which, though not "the cause of death, might have been." "The propo- "sition that these expressions amount to an absolute "warranty," said LORD FULLERTON, "not only that she "never felt herself to be affected with any complaint, or "exhibited any symptom of complaint, but absolutely, "that whether felt or not, no disease in any form ex- "isted in her constitution, is rather startling, and it is "necessary to examine the ground on which it rests." "Let a fair . . construction be applied to the terms "'good health,' in which the whole plea of the defend- "ers is rested. It occurs in the description of the state "of a *living* individual—which state, in *so far* as *evident* "to *others* or *perceptible by himself*, can *alone* form the "*subject* of *description*, and when so employed, does it "denote anything more than the absence of any *osten-* "*sible* or *known*, or *felt symptoms* of disorder? Would "any man, however scrupulous in the use of terms, "hesitate to declare himself *on soul* and *conscience*, in "perfect health, so long as he felt himself in the per- "fect and healthy exercise of all the functions by which "health could be tested; and was utterly unconscious

"of any derangement by which those functions were "likely to be impeded? Or could it be with any show "of reason charged against him as an *untruth*, because "for anything he knew, there *might*, by possibility, "*exist* at the moment, some *hidden defect* or *malforma-* "*tion*, or *morbid derangement*, inoperative externally for "the time, but sure at some future period to prove "fatal? If this were requisite to justify the declaration "of good health, it is clear that *such a declaration never* "could *with certainty* be made; and *this goes far to settle* "*the point* in dispute. The point is, the meaning of a "term in a contract, and the term occurs in a declaration "asked by one party and given by the other. Now if "*in one sense* of the term it admits of being declared in "the *negative* or *affirmative*, and if in the *other sense*, it "*never can be the subject of an affirmative or negative*, "*can there be a doubt in which sense the term is used?* "If the term 'good health,' means the perfect, con- "scious enjoyment of all one's faculties and functions, "and the conscious freedom from any ailment, *the ques-* "*tion may be asked and answered;* but if the term is "construed as meaning an absolute freedom from all "defect or derangement, imperceptible as well as per- "ceptible, *the declaration is one which cannot be made*, "and which it would therefore be absurd to ask. And "when the defendents represent it *as a warranty, noth-* "*ing is gained* in the inquiry, because the question

"occurs, *What is it which was warranted?* 'Good
"'health;' and that just leads to the same inquiry in
"*what sense* that term was employed; for it will be ob-
"served, there is here no *express* warranty by which a
"party may, and often does, take the risk of events or
"circumstances on which he possesses no present infor-
"mation. Here the warranty is at best only implied
"from the term of a declaration, asked by one party
"and given by the other, and which is made part of the
"contract; and as the term is used in these declara-
"tions, its sense must be determined by that which it
"evidently bears in the passage containing it. The
"provision that the declaration shall form the basis of
"the contract, may be held to render the *declaration*
"*equivalent to a warranty;* but still the point, *what* is
"declared and consequently *what* is *warranted, depends*
"*on* the *construction of the declaration,* and in choos-
"ing between two senses of the disputed term, ac-
"cording to one of which a party *may declare,* while
"according to the other it would be absurd to ask, and
"*impossible to give* a declaration, the former sense *must,*
"*accordingly to every rule of construction,* be adopted.
" . . . In my opinion, the *statement* in the declaration
"here was, in its sound construction *true, if* the *party*
"making the declaration *never had any consciousness of*
"*ailment aud never had exhibited* any symptoms of
"ailment. According to the ordinary and *only* intelligi-

"ble sense of the term in the circumstances in which it "was used, she was in good health, if she neither was "conscious of, nor exhibited the slightest symptoms of "disease. Nothing short of an act of parliament, adds "LORD JEFFREY, would induce me to put a different "construction on such a contract. *Untrue* has *two* "meanings, a *moral* and a *physical*. In the latter, a "statement is untrue, when a person is the victim of "imposition. It is only untrue in the former sense, "that will invalidate a policy of insurance, when the in- "sured declares what he *knows to be untrue*, or *might* "*have known by due care and inquiry, or conceals the* "*truth in the same manner*. . . He declares that he has "no disease or *unease*. This must mean so far as he "knows, or possibly can know. Let us bring this to a "practical test. If the defenders' construction of the "warranty be the true one, can they deny that it would "be but fair to set forward its tenor accordingly? "Now I shall like to see those officers that would *de* "*futuro* insert their intention in their policies thus: "Persons insuring in this office will please take notice, "that *though they have always enjoyed good health,* "*and the doctors on their examination could discover* "*nothing amiss, still, if at any future time, it shall turn* "*out that they had in them the germ of a disease of a* "*serious nature, which if known to the officers at the* "*time of insurance would have made them hesitate to*

"*insure, the policy shall be void.* If they are honest, "they should put this in their policies; for it is proper "for persons insuring to know that this is the state of "the law. *It is clear, that in the knowledge of this no "one would ever insure.* I think *that is sufficient to "determine the present question.* The insurance com- "pany *know* they have *no case*, and the view of the in- "surance company is, that the *declaration of the insured "is a counter-insurance;* that he gets insured on the "one hand, but on the other insures against the risk "arising from a thing unknown, and which could not be "known. They construe his declaration as of this "kind: 'I positively declare that I have not in the in- "terior of my skull, heart, or anywhere else, the seeds "of a fatal malady!" To make such a declaration "would be *impious*, and yet it is the only shape in "which the guarantee contended for could be put."*

There is another aspect in which to look at the turning-point of warranty or representation. The representations of the insured are declared to furnish the *consideration* for the policy. The representations do constitute a consideration, which is furnished by the insured. His resources of knowledge which he contributes about himself, serve in part as an equivalent for the insurers' undertaking. The risk could not be calculated without a disclosure made by the insured. A *warranty*

*Hutchinson v. National Loan Fund Assurance Society, 7 Court of Session Cases, 2 Series 467 S. C. 3 Bigelow's Life and Accident Rep's. 444.

is not a consideration. The fact which the warranty covers, is a part of the risk, which the insurers take. Let the warranty *except* the warranted fact from the risk; then they do not insure against the excepted fact. There is no insurance, and therefore no need for a consideration.

The answers therefore cannot be warranties, but must be what the policy makes them, representations. What then is a representation?

A representation, statement or declaration is not a *fact*, but a fact *as conceived by the mind*. The words express what the mind perceives and knows, they exhaust the contents of the mind, portray or exhibit facts which have entered the mind. A fact which is *inaccessible* to the mind cannot be bodied forth from it, because never having got into the mind, it cannot be put out of it. Let the fact once get in, and the mind to be true to itself, must reflect the fact as it appeared to its consciousness. A faithful reproduction of facts which have penetrated the mind is *truth of statement*, a representation or counter-presentment of what has first been presented to the mind.

The plaintiff's answers however were held to be warranties, and the learned judge would entertain no suggestion that the answers were any thing but warranties. A new trial would not avail the plaintiff, unless the main question of a warranty or representation

were decided. The jury, it was admitted by the court, met the issue of fraud or false representation, and annihilated it. If there was no warranty, the fact of disease was not involved in the case. Then the court and jury agree, and judgment should by common accord be entered for the plaintiff.

No subsequent trial could raise any defence to the plaintiff's cause of action. The defendants have put in issue everything which involves their liability under the policy. No evidence to establish a defence which might have been made under the general issue, but which was, in point of fact, abandoned, would be competent.*

The facts that the insured had no disease, and made no false representation, have been found by the jury, and the jury found both facts upon the identical evidence which was before the court on this, the third, trial. The counsel for plaintiff and the counsel for defendant, both joined at the trial, and submitted the case to the court upon the evidence which was before the jury on the previous, or second, trial. The question of warranty is raised in spite of the verdict, and the point of law comes up for review as if upon the entry of judgment *non obstante veredicto.*

*Phosphate Sewage Co. v. Molleson, 4 Appeal Cases, 801; Aurora City v. West, 7 Wall., 82; Beloit v. Morgan, 7 Wall., 619; Tioga R. R. v. B. & C. R. R., 20 Wall., 137; Cromwell v. Co. of Sac, 4 Otto, 351.

The learned Judge withdrew the case from the jury, and decided it upon a question of law. He admitted the facts by taking them from the jury, and he acted upon the facts as if they had been established by a verdict. The judgment is, therefore, on account of the admitted identity of the facts on both trials *non obstante veredicto*, and if reversed for error committed by the learned Judge in creating a warranty *juris et de jure* would be entered by this court for the plaintiff, and the case would not be remanded for a re-trial.

The Supreme Court could reverse and enter judgment on the record, as well as the court below could do it. A suit was brought for a debt, which the debtor claimed had been extinguished by his submitting to process and letting judgment go by default, in pursuance of an agreement that the plaintiff should get title by the sheriff's sale. The accord was satisfied by a sheriff's deed taken by the plaintiff. He, however, sued for the balance of his debt which had not been paid by the nominal bid at the sheriff's sale, and recovered judgment for the balance. Judgment might be entered in the Supreme Court for the defendant on reversal.* If no fact is at issue, the appellate court enters judgment and puts an end to the litigation.† A court of appeals is no longer bound by technicalities in administering

*Savage v. Everman, 20 P. F. Smith, 315.

†Whitehead v. Kennedy, 69 N. Y., 462; Foot v. Aetna Ins., 16 Sickels, 571.

equity by its judgment. Though at common law a verdict could not be set aside as to one without setting it aside as to all, there is no such obstacle now to a severance of the verdict.* A defence was made in common by several companies to the plaintiff's claim. The plaintiff recovered judgment, which was entered against them all jointly. They appealed in order that the liability of each company might be fixed for its quota by a several judgment. The joint judgment was converted into several judgments by this court.†

The policy should be governed by the law of Pennsylvania, where the defendants have their office, and where the contract was to be performed. A contract was made in Virginia to be performed in New Jersey, the action was barred by the New Jersey statute of limitation in six years‡ New Jersey law forbids a foreign insurance company from doing business in New Jersey, but persons in New Jersey were insured by a Pennsylvania company. A Pennsylvania contract and governed by Pennsylvania law.§ A subscription in Indiana to the stock of an insurance company in Illinois is governed by Illinois law.‖ The assignment, although delivered to the holder in Maryland, was a New York contract.¶

*Purnell v. Great Westn Rlwy. 1 Q. B. D. 636.
†Ins. Companies v. Boykin 12 Wall. 433.
‡Spratley v. Mutual Benefit Life Ins. 11 Bush., (Ky. 1847,) 443.
§Columbia Fire Ins. v. Kinyon, 8 Vroom., (N. J. 1874), 33.
‖Payson v. Withers 5 Bissell, U. S. C. C. R., 278.
¶Barry v. Equitable Life, 59 N. Y., 587.

As the parties did not have the law of the place where the contract was made in view,* the contract is interpreted by law of place where it is to be executed.† And the law of that state expounded by its own courts must be followed by other courts passing upon the contract,‡ hence a policy of insurance issued by an English company, and to be paid in England, was governed by English law, though the holder was French and the ship was French.‖ General rule.¶

The case, which declares the law of Pennsylvania, contains the following condition:

"This policy witnesseth that the Washington Insur-
"ance Company, in consideration of the representa-
"tions made to them in the application for this policy,
"and the sum of $212.80, do insure the life of . . .
"Eureka Randon.

"This policy is issued, and accepted by the assured,
"upon the following express conditions and agreement
". . . if *any* of the *statements* or *declarations* made
"in the application for this policy, upon the faith of
"which this policy is issued, shall be found *in any re-*
"*spect untrue*, . . . then in *any* and *every* such case the
"said company shall not be liable for the payment of

*Ruse v. Mutual Benefit Life, 23 N. Y., 516; St. John v. American Mutual Life, 2 Duer 419; Pomeroy v. Manhattan Life, 40 Ill., 398.
†Story §270 n. 3; 272 a; 304 b.
‡277.
‖278 a.
¶280.

"the sum insured, or any part thereof, and this policy "shall be null and void, and shall cease and determine."

The application contained the following: "Has "the party consumption, or any disorder, infirmity or "weakness tending to impair the constitution? Ans. "'No.' The application continued: "It is hereby de- "clared that the above are fair and true answers to the "foregoing questions, and it is acknowledged and agreed "by the undersigned that the above statement shall "form the basis of the contract for insurance, and also "that any wilful, untrue or fraudulent answer, any sup- "pression of facts in regard to the party's health, will "render the policy null and void."

The policy was dated the 16th of October, 1871, and the insured died the 24th of October, 1871. A post-mortem disclosed the cause of death to be consumption, the lungs were filled with tubercles, and the other organs much diseased. The external appearance of health continued to within two or three days of death, and the insured was attending to work.

A point made for the company was: "If the jury find "from the evidence that any misstatement was made in "answer to any of the interrogatories *whether intentional* "*or not* such misstatement will avoid the policy, and the "verdict must be for the defendant." Negatived. Thayer judge, charged that: "under the terms of the insurance "the answers to the questions contained in the applica-

"tion were representations and not warranties. If the "answers were truthfully, honestly and faithfully made, "and nothing was suppressed, concealed or kept back, "which it was material for the defendant to know, then "the policy was not avoided, by the fact that some of "the answers were in point of fact, incorrect, errone- "ous or untrue.* The assured died suddenly ten days "after the application was made, and the weight of "evidence undoubtedly was, that she died of an abcess "in the right lung. A post-mortem examination made "at the request of the defendant revealed the fact that "the right lung was much diseased, and previous to "the insurance the deceased was examined by Doctor "Griffith, a regular physician, and employed by the "company for that purpose, and that the deceased "appeared at the time of her examination, to be in "good health. He had given a certificate accordingly "to the company.

"The insurance agent who brought the application "to the company . . . saw no evidence of disease what- "ever in Eureka Randon, at the time her application "was made. We are asked to set aside the verdict "upon the theory, Eureka Randon must have known "that she was diseased, because she died of an abcess

*Schaible v. Washington Life Ins. 9 Philada., 136. S. C. 4 Ins. Law Journal 629. Affirmed, Washington Life Ins. v. Schaible, 1 Weekly Notes, 369. Knecht v. Mutual Life Ins. Co., 37 Legal Intelligencer, 28.

"in her right lung, ten days after her application for "insurance. How can we say that of a person who, "according to all the evidence, presented every out- "ward appearance of health, almost to the very time "of her death?

"Can we say that she ought to have been more wise in "surgery than the company's examining physician, who "upon a deliberate corporal examination, declared and "certified, that she was in good health? Would it be "reasonable for us to conclude as a matter of law, that "Eureka Randon was wiser than Doctor Griffith, and "that she knew she was diseased, although the defend- "ant's physician could not?"

JAMES PARSONS,
Attorney for Plaintiff.

APPENDIX.

Letters.

MOULOR
v.
AM. LIFE INS. CO.

S. C. U. S.

No. 255.

32 So. 3rd St., Philad'a,
Oct. 28, 1879

MESSRS. HENRY HAZLEHURST,
and ISAAC HAZLEHURST,

My dear sirs:—In taking up the Record of this case in order to prepare a paper book, I find some defects which must be rectified before we can argue the case on error.

FIRST: The writ of error refers to both commissions [see page 10], which were issued to N. O., but does not introduce them by a *prout*, and hence they were not printed as a part of the record.

This was possibly my fault; but it is explained by my absence from town in the Summer of 1878, when the summons came from Washington, to make up and remit the record. I left the matter, I thought, in competent hands, but they made a mess of it. The record is full of misprints and blunders.

SECOND: The docket entries are not certified as they appear on the C. C. Docket, but different items are ticked off and sent up by the clerk, according to his idea of the case. We are

interested in having the docket as it stands before the Supreme Court.

What I ask of you, therefore, is that I should print the commissions, on which both our arguments turn, in my paper book, with the same effect as if they were on the record itself, and should also print a correct copy of the docket entries.

Very truly yours,

JAMES PARSONS,
Att'y for Plff.

MOULOR
vs.
LIFE INS. Co.

U. S.
SUPREME COURT,
No. 255.

JAMES PARSONS, Esq.,
Plff's Attorney:

DEAR SIR:—We are in receipt of your letter of Oct. 28th, and are entirely willing to comply with its request.

Very Truly Yours,
HENRY HAZLEHURST.

November,
Fourth, 1879.

MOULOR
v.
AM. LIFE INS.

U. S. S. C.

Record, No. 255.

32 So. 3d St., Phil'a,
Dec. 24, 1879.

MESSRS. ISAAC & HENRY HAZLEHURST:

DEAR SIRS:—I went to the court office yesterday to consult the "Minutes," which are referred to in

the docket entries, for particulars of the trial, and found no mention of the fact that we submitted the case upon the evidence at the former trial without any change. As I have put this fact in my "Statement of the Case," but do not wish to assert anything you might wish to deny, which is not on the record, I ask you to confirm my statement, if you have no objection.

I am busy at my paper book, and hope to furnish you a copy very soon.

Yours truly,

JAMES PARSONS.

MOULOR v. INS. CO. } U. S. S. C. Record, No. 255.

To MR. JAMES PARSONS:

DEAR SIR—We cannot comply with the request contained in your note of Dec. 24th. We beg to be furnished at your earliest convenience with your Brief, as the case is far upon the List.

Very Truly, etc.,

HENRY HAZLEHURST,
ISAAC HAZLEHURST.

(No date, but post-marked Dec. 26, 1879.)

MOULOR v. AM. LIFE. } S. C. U. S. Record, No. 255.

32 So. 3d St.,
Phil'a, Dec. 27, '79.

MESSRS. I. & H. HAZLEHURST:

DEAR SIRS—As you do not feel at liberty to volunteer the acknowledgement that we submitted the case

upon the evidence of the former trial, and as that fact ought to appear upon the record, I notify you hereby that I rely, and upon the argument, and shall insist upon that fact, which is undeniable.

I am rushing through with my paper book, and you shall have it as soon as it can be prepared.

Very truly yours,

JAMES PARSONS.

Docket Entries.

APRIL SESSION, 1873.

JAMES PARSONS.	EMILIE MOULOR, A CITIZEN OF THE STATE OF LOUISIANA,	
19	*vs.*	SUMMONS
H. & I. HAZLEHURST.	THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION UNDER THE LAWS OF PENNSYLVANIA.	DEBT.

1873. May 20. Præcipe filed. Summons Debt issued, returnable on the first Monday of June next.

" " 22. Henry Hazlehurst and Isaac Hazlehurst, Esqs., appear for defendants.

" June 2. Summons returned served.

" " 3. Narr. filed. Rule to plead in 8 days, or judgment *sec. reg.*

" " 5. Defendants plead: Nil debet and payment.

1873.	June	23.	Rule for a commission on 15 days notice to New Orleans.
"	"	23.	Interrogatories in chief filed.
"	July	9.	Cross-Interrogatories filed.
"	"	10.	Commission to New Orleans, La., exit.
"	"	28.	Plaintiff files nomination of another commissioner on her behalf, under the commission to New Orleans, La.
"	Oct'r	15.	Commission to New Orleans received and opened in open Court.
1874.	March	24.	Struck jury list filed by the plaintiff.
"	April	16.	And now, to wit., this 16th day of April, A. D., 1874, a jury being called, come; to wit. [see minutes.]
"	"	16.	A juror is withdrawn and case continued at costs of plaintiff for the term.
1876.	Jan'y	15.	Rule for Commission to New Orleans and interrogatories filed.
"	Feb'y	8.	Commission to New Orleans issued.
"	March	3.	Commission to New Orleans opened in open Court and filed.
"	"	17.	Special pleas filed by defendant.
"	April	3.	And now, to wit., this April 3rd, A. D. 1876, a jury being called, come; to wit.: [see minutes].
"	"	4.	And, to wit., this April 4th, A. D. 1876, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say, that they find for the Plaintiff, and assess the damages at Eleven Thousand, nine hundred and fifty dollars, with costs
"	"	5.	Reasons for a new trial filed.

1876.	April 15.	Verdict set aside and new trial granted [folio 513].
"	October 2.	And now, to wit., this 2d day of October, A. D. 1876, a jury being called, come; to wit. [see minutes].
"	" 2.	And now, to wit., this 2d day of October, A. D. 1876, the jurors, upon their oaths or affirmations, aforesaid respectively do say that they find for the defendant.
"	Nov'r 14.	Præcipe for writ of error filed.
"	" 14.	Writ of error issued and copy thereof lodged for the adverse party in the Clerk's office.
1877.	April 25.	Bond *sur* writ of error approved and filed.
"	" 25.	Citation issued.
"	May 11.	Citation returned service accepted for defendant by Henry Hazlehurst, Esquire.
"	" 11.	Bill of Exceptions filed.
"	" 11.	Clerk's costs paid.
"	Oct'r 8.	Record and writ of error transmitted to the Clerk of the Supreme Court of the United States.

Commissions to New Orleans.

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE THIRD CIRCUIT, OF APRIL SESSION, 1873, No. 19.

EMILIE MOULOR, A CITIZEN OF THE STATE OF LOUISIANA,

vs.

AMERICAN LIFE INSURANCE COMPANY, A CORPORATION UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA.

THE PRESIDENT OF THE UNITED STATES,

To M. Eusebe Bonny, Notary Public, No. 44 Exchange Place, New Orleans, and the firm of Race, Foster and E. T. Merrick, Attorneys-at-Law, corner of Camp Street and Commercial Place, New Orleans, Louisiana:

KNOW YE, That, in confidence of your prudence and integrity, WE have given unto you, and by these Presents do give unto you full power and authority, in pursuance of a rule, lately made in the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, in a certain action of debt therein depending, wherein the said Emilie Moulor is Plaintiff, and the said American Life Insurance Company is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said parties respectively, as witnesses in the said action

and then and there to examine them, on their respective oath or affirmation, on certain interrogatories, and cross-interrogatories, hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up, and under your seals, plainly and distinctly set, together with this writ.

WITNESS the Honorable Nathan Clifford, Associate Justice of the Supreme Court of the United States, at Philadelphia, the tenth day of July, A. D. 1873, and in the 98th Year of the Independence of the said United States.

[SEAL]

SAMUEL BELL.
Clerk of Circuit Court.

[MARGINAL NOTE:—1873. July 28. Plaintiff names as Commissioner: P. Charles Cuvellier, Notary Public, No. 140 Gravier St., New Orleans, in place of M. Eusebe Bonny, who is at present sick and unable to attend to the duties of the Commission, and his name is therefore substituted accordingly.

EMILIE MOULOR, a citizen of the State of Lousiana,	Circuit Court of the United States, for the Eastern District of Pennsylvania.
vs.	
AMERICAN LIFE INSURANCE COMPANY, a corporation under the Laws of the Commonwealth of Pennsylvania.	April Sessions, 1873 No. 19.

And now, to wit: June 24, 1873, James Parsons, Attorney for the Plaintiff, enters a rule for a commission in the above case to take testimony at New Orleans, in the District of Louisiana, on fifteen days notice.

EMILIE MOULOR, a citizen of the State of Louisiana, vs. AMERICAN LIFE INSURANCE COMPANY, a corporation under the laws of the Commonwealth of Pennsylvania.	Circuit Court of the United States, for the Eastern District of Pennsylvania. April Sessions, 1873 No. 9.

Interrogatories to be exhibited to witnesses to be produced, sworn or affirmed, and examined, on the part of the plaintiff in the above case, before Commissioners to be named in a commission to be issued out of the said Court, to New Orleans, in the District of Louisiana:

First. What is your age, residence and occupation, and how long have you had your present residence, and how long have you pursued your present occupation?

Second. Were you acquainted with the late Louis Moulor, the husband of Emilie Moulor, the plaintiff in this action?

Third. How long have you been acquainted with the said Louis Moulor?

Fourth. In what place or places did he live, and how long did he live in each place?

Fifth. In what business or businesses was he engaged, and what was the period during which he was engaged in each business?

Sixth. What was the character which he sustained in business?

Seventh. What was the character which he sustained in domestic and social life.

Eighth, What was the result of his business operations?

Ninth. What effect did his business have upon his health, and his disposition?

Tenth. What was the immediate cause of his death, and what were the circumstances which attended it?

If in reply to the first interrogatory you shall have answered that you are a medical expert,

Eleventh. What was the state of his health, and his physical condition at the time of his death?

Twelfth. If he killed himself, what was his mental and moral condition previous to and at the time of the act of self-destruction?

Thirteenth. Was he or was he not able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing?

Fourteenth. Was he or was he not capable of forming a rational judgment about the act he was doing?

Fifteenth. Do you know any thing else which may be material or of use to the plaintiff? If aye, state the same fully, minutely, and at large, as if you had been particularly interrogated in relation thereto.

JAMES PARSONS,
Att'y for Plaintiff.

The Plaintiff names as Commissioner on their behalf, M. Eusebe Bonny, Notary Public, No. 44 Exchange Place, New Orleans.

EMILIE MOULOR *vs.* AMERICAN LIFE INS. CO.	}	U. S. C. C. April Sess., 1873. No. 19.

Interrogatories to be exhibited by way of cross-examination to and answered by witnesses to be produced, sworn or affirmed, and examined on the part of the plaintiff by the above named Commissioner:

First Cross-Interrogatory. Have you any interest of any kind in the suit? or contingent upon the result of it?

Second Cross-Interrogatory. Were you connected by birth or marriage, or in any way, with the deceased, or are you with the plaintiff?

Third Cross Interrogatory. Were you a member of his family, and did you become acquainted with his domestic and social life? Was it by personal interview or by correspondence? If the latter, annex the same to your answer.

Fourth Cross Interrogatory. What was his business when first established? What was the amount of his capital? Who were his clerks? Furnish a copy of his profit and loss account from the time he first went into business until his death.

Fifth Cross Interrogatory. Were you present at his death? How did it occur? Had you attended him before his death? How long and for what disease? When did you first visit him, and for what cause?

Sixth Cross-Interrogatory. If in answering the plaintiff's thirteenth (13th) interrogatory in chief you say that the plaintiff was not able to distinguish right and wrong, or to appreciate the nature and quality of the act he was doing, please state minutely and particularly the grounds of your opinion, and the particular symptoms of the disease.

The defendants name as their Commissioner, the firm of Race Foster and E. T. Merrick, Attorneys-at-Law, corner of Camp Street and Commercial Place, New Orleans, La.

HAZLEHURST,
for Dfts.

Depositions of witnesses produced, sworn and examined on the ninth (9) day of October, in the year of our Lord one

thousand eight hundred and seventy-three, at the office of P. Charles Cuvellier, Notary Public, No. 140 Gravier Street, in the City of New Orleans, in the State of Louisiana, by virtue of a commission issuing from the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, to P. Charles Cuvellier, Notary Public, No. 140 Gravier Street, New Orleans, and the firm of Race, Foster & E. T. Merrick, Attorneys at Law, corner of Camp Street and Commercial Place, New Orleans, Louisiana, directed for the examination of witnesses in a certain cause depending in said Court, wherein Emilie Moulor, a citizen of the State of Louisiana, is plaintiff, and the American Life Insurance Company, a corporation under the laws of the Commonwealth of Pennsylvania, is defendant.

Jules A. Mathien, of the City of New Orleans, aged forty-eight years, or thereabouts, being produced, sworn and examined on behalf of the plaintiff, deposeth as follows:

To the first Interrogatory on the part of the plaintiff, he answers as follows:

My age is forty-eight years; my residence, New Orleans, and my occupation that of a physician. I have resided in New Orleans since the year 1837, and have pursued my occupation since the year 1854.

2. To the second Interrogatory on the part of the plaintiff, he answers as follows:

I was.

3. To the third Interrogatory on the part of the plaintiff, he answers as follows:

Ever since the year 1855.

4. To the fourth Interrogatory on the part of the plaintiff, he answers as follows:

Since I have known him, he resided in New Orleans, except his taking two trips to Europe, each of a few months and on business.

5. To the fifth Interrogatory on the part of the plaintiff, he answers as follows:

When I first knew him, he kept a leather store in Chartres Street. In the latter part of 1858, or the beginning of 1859, he opened a tobacco store in partnership with Mr. Fleury. His connection with Mr. Fleury ceased in 1865, and in that same year he went into partnership in the same business with Mr. Fidel, and that partnership ceased to exist in 1866; he all that time continuing to keep his leather establishment. In the leather business, in 1861, he took into partnership Mr. Dumestre, and this association ceased on the 1st of May, 1872, by contract, but in fact only on the 23rd of that same month; from said month of May, 1872, Moulor was no longer in the leather business. In the year 1869 he had bought a plantation in the Parish of St. James. A sugar plantation, which was sold to Mr. J. Trotot about a week before the death of Moulor. At the time of his death he was engaged only in the tobacco business, keeping a store at the corner of Old Levee & Bienville Streets, and a Factory in the Third District of New Orleans.

6. To the sixth Interrogatory on the part of the plaintiff, he answers as follows:

Up to the time of his death he sustained a very good character—that of a very honorable man.

7. To the seventh Interrogatory on the part of the plaintiff, he answers as follows:

A very good character. A good husband, a good father, always ready to assist his friends in need, and very charitable generally; he was of very sober habits.

8. To the eighth Interrogatory on the part of the plaintiff, he answers as follows:

His business was thriving as long as it was limited to the Leather store; with the tobacco store he discovered, in 1865, great losses, which his partner, Mr. Fleury, could not account for, and that was the occasion of a law suit by him against Fleury; the same was the case with Fleury's successor, Mr. Fidel. Great losses occurring, which Fidel could not account for, and that gave rise to another suit against Fidel; then again his sugar plantation, for the management of which he had taken Mr. Carete as a partner, was a constant source of unceasing expenses, and during the four years that he owned the plantation not a single good crop was realized.

9. To the ninth Interrogatory on the part of the plaintiff, he answers as follows:

It had a very depressing effect on his mind, and more and more so as he realized he was sinking. Once, in the latter part of December, 1872, he exhibited to me in several instances that he was gradually losing moral judgment; from the 31st of December, 1872, to January, 1873, during the night he woke up, complaining of a most intense pain in his head. I was sent for, and in the morning he said he had felt as if he had been losing his mind in that night, but it vanished in the morning.

10 To the tenth Interrogatory on the part of the plaintiff, he answers as follows:

On the 3d of January, 1873, at about 10 o'clock in the morning, he was seated in a horse car, which plies from the terminus of the Esplanade Street line to the terminus of the Canal

W. H. FOSTER,
Com'r of Deft.

P. CHS. CUVELLIER,
Commissioner
for plff.

Street line running on the Metanic Ridge Road; he was at the Bayou St. John end of the Road, alone in the car, not even the driver being present, (the driver was in a bar-room across the road), when suddenly the report of two pistol shots was heard; the smoke in the car caused the driver to come back to it, when he found, together with some few persons who had followed him, the body of Mr. Moulor lying on his face on the floor of the car, and a pistol a few inches from his right hand; he was then dead. The above facts I state as having been elicited at the inquest. His corpse was brought to his home, where I saw it. I examined it, and in my judgment the death had taken place from the effect of two pistol shot wounds, one ball entering the mouth, passing through the brain, had made its exit on the right side of the head; the other ball had entered the inner side of the right eye, just below the eye brow; that ball also passing through the brain. Either of the wounds would have been sufficient to destroy life.

11. To the eleventh Interrogatory on the part of the plaintiff, he answers as follows:

Ordinary. Nothing abnormal had taken place in his physical condition, except the pains suffered by him in the head, as stated before, in the night from Dec. 31, 1872, to Jan'y 1, 1873.

12. To the twelfth Interrogatory on the part of the plaintiff, he answers as follows:

He had pretty much lost the faculty of moral judgment, in fact he could not form a correct judgment; he would at times begin sentences and then find himself in the impossibility of finishing them, losing sight entirely of the subject of his thoughts, which would make him very nervous; these aberations were the more striking in his case because, naturally, he

was of a very cold, sedate turn of mind, always exempt from any enthusiasm or excitement whatever.

13. To the thirteenth Interrogatory on the part of the plaintiff, he answers as follows:

I should think not.

14. To the fourteenth interrogatory on the part of the plaintiff, he answers as follows;

Again, I should think not.

15. To the fifteenth Interrogatory on the part of the plaintiff, he answers as follows:

Nothing further than what I have before stated.

X.

X-1. To the first cross-Interrogatory on the part of the defendant, he answers as follows:

None whatever, neither directly nor indirectly.

X-2. To the second cross-Interrogatory on the part of the defendant, he answers as follows:

Neither with the plaintiff nor with the deceased in any manner or to any degree whatever.

X-3. To the third cross-interrogatory on the part of the defendant, he answers as follows:

I was acquainted with him since the year 1855, as his physician. I was acquainted with his wife, her mother and her

W. H. FOSTER,
Com'r for Defts.

P. CHAS. CUVELLIER,
Comm. for Plff.

father, as their family physician, since 1855; besides visits as a physician, I made social calls, but was not a member of the family.

X-4. To the fourth cross-Interrogatory on the part of the defendant, he answers as follows:

As I have stated before, when I first knew him he was in the leather business, then went into the tobacco business concurrently with the other, then purchased a sugar plantation, which he sold shortly before his death, and at his death was solely engaged in the tobacco business. In the leather store he had, as clerks, Claudel, Dumestre, and some others; in the tobacco business he had Desca and some others. I cannot state the amount of his capital, although at one time it was reputed to be over a hundred thousand dollars. I have no means of furnishing the copy demanded in this Interrogatory.

X-5. To the fifth cross-Interrogatory on the part of the defendant, he answers as follows:

I was not present at the moment of his death, but saw his body two hours afterwards; it occurred as the result of two pistol shot wounds, as I have described before. I had attended him as his physician since 1855, for chronic asthma, manifestations of the first stage of consumption; this was in 1858 and 1859; afterwards for slight indispositions from time to time; besides the asthma, to which he was constitutionally subject, I also treated him for scrofula all the time; the last disease for which I was called previous to his death, was on the occasion of the pains in the head, of which he suffered in the night from December 31, 1872, to January 1, 1873.

My first visit to him as a physician was in 1855, for asthma.

X-6. To the sixth cross-Interrogatory on the part of the defendant, he answers as follows:

The symptoms were those that I have mentioned before—depression of spirits, aberation of the mind, his inability to finish sentences after having begun them, and forgetting what the subject of his ideas had just been. When he would realize this incapacity of keeping his mind under the control of his will, he would at times nervously strike his head with his fist, would at times suddenly start from a sitting position and walk about; his memory, although perfect, therefore was much impaired, and would often betray him in spite of his most energetic efforts; he would also at times become interrupted in his speech, and seem lost in some unexpressed ideas; he had a wandering look about his eyes, and would pause in that way at times for ten or fifteen minutes.

P. CHAS. CUVELLIER, for plff.
W. H. FOSTER, of Race Foster & E. T. Merrick, for defts.
} JULES A. MATHIEU, M. D., Commissioners.

STATE OF LOUISIANA,
PARISH OF ORLEANS,
CITY OF NEW ORLEANS.

WE, P. Charles Cuvellier and William H. Foster, (of the firm of Race Foster & E. T. Merrick) at the City of New Orleans, in the Parish of Orleans, and State of Louisiana, do hereby certify that the said Jules A. Mathieu, prior to the taking of the said depositions on the ninth day of October, A. D. 1873, was, by the above named P. Charles Cuvellier,

duly sworn to testify the truth, the whole truth, and nothing but the truth, in relation to the matter in controversy in the suit before mentioned in the caption to these depositions and in the enclosed commission, so far as he might be interrogated in relation thereto; and the said deposition was, on said ninth day of October, A. D. 1873, in the City of New Orleans, in the Parish of Orleans, and State of Louisiana, sworn to, taken and reduced to writing, and signed by the said witness in our presence.

Given under our hands and seals, in the City of New Orleans, in the Parish and State aforesaid, this ninth day of October, A. D. 1873.

P. CHAS. CUVELLIER, [SEAL]
Commissioner.

W. H. FOSTER, [SEAL]
Com'r for
Defendants.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*

I. SAMUEL BELL, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Commission to New Orleans, with depositions attached thereto, in the case of Emilie Moulor *vs.* American Life Insurance Co.—No. 19,

April Session, 1873—on file, and now remaining among the records of the said Court in my Office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Court, at Philadelphia, this First day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of these United States, the Ninety-eighth.

[SEAL]

SAMUEL BELL,
Clerk of the Circuit Court U. S.
E. D. of Pennsylvania.

THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE THIRD CIRCUIT, OF APRIL SESSION, 1873, No. 19.

EMILIE MOULOR, A CITIZEN OF THE STATE OF LOUISIANA,

vs.

THE AMERICAN LIFE INSURANCE COMPANY, A CORPORATION UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA.

THE PRESIDENT OF THE UNITED STATES,

To John G. Eustis, Esquire, No. 35 Carondolet Street, New Orleans, Louisiana.

KNOW YE, That, in confidence of your prudence and integrity, WE have given unto you, and by these Presents do give unto you, John G. Eustis, Esquire, full power and au-

thority, in pursuance of a rule, lately made in the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, in a certain action in debt therein depending, wherein the said Emilie Moulor is Plaintiff, and the American Life Insurance Company, a corporation under the laws of Pennsylvania, is Defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said Plaintiff, as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation on certain interrogatories, hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up, and under your seals, plainly and distinctly set, together with this writ.

WITNESS the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this Eighth day of February, A. D. 1876, and in the 100th Year of the Independence of the said United States.

[SEAL]

SAMUEL BELL.
Clerk of Circuit Court.

EMILIE MOULOR, a citizen of the State of Louisiana,	Circuit Court of the United States, for the Eastern District of Pennsylvania.
vs.	
AMERICAN LIFE INSURANCE COMPANY, a corporation under the laws of the Commonwealth of Pennsylvania.	April Sessions, 1873 No. 19.

And now, to wit., January 15, 1876, James Parsons, Attorney for the Plaintiff, enters a rule for a commission in the

above case, to take testimony at New Orleans, in the district of Louisiana, on fifteen days' notice.

Interrogatories to be exhibited to witness to be produced, sworn or affirmed, and examined, on the part of the plaintiff in the above case, before Commissioners to be named in a commission to be issued out of the said Court, to New Orleans, in the District of Louisiana:

First. What is your age, residence and occupation, and how long have you had your present residence, and how long have you pursued your present occupation?

Second. Were you acquainted with the late Louis Moulor, the husband of Emilie Moulor, the plaintiff in this action? If so, how long have you been acquainted with him?

Third. If he killed himself, state if you know the immediate cause of his death and the circumstances attending it.

If you were the family physician of the said Louis Moulor,

Fourth. Explain in detail the nature and extent of any disease, which did, or might have affected or impaired, according to your judgment, his general or permanent health.

Fifth. If you have referred to any disease which affected the said Moulor, in general terms, be explicit and define with accuracy the character and modifications of them in the particular instances of the subject, Louis Moulor.

Sixth. Do you know anything which may be material or of use to the plaintiff? If aye, state the same fully, minutely and at large, as if you had been particularly interrogated in relation thereto.

JAMES PARSONS,
Attorney for Plff.

Jan'y 15th, 1876.

The Plaintiff names as Commissioner on her behalf, John G. Eustis, Esquire, Attorney at law, No. 35 Carondelet Street, New Orleans, Louisiana.

Deposition of witness produced, sworn and examined on the Twenty-third day of February, in the year of our Lord 1876, at the office of John G. Eustis, No. 35 Carondelet street, in the city of New Orleans, within the Parish of Orleans, and State of Louisiana, by virtue of a commission issuing from the Circuit Court of the United States, for the Eastern District of Pennsylvania, to him directed, for the examination of a witness in a certain cause depending in said Court, wherein Emilie Moulor is Plaintiff, and The American Life Insurance Co. is Defendant.

Julius A. Mathieu, of the City of New Orleans, aged 51 years, or thereabouts, being produced, sworn and examined on behalf of the plaintiff, deposeth as follows, in answer to the several interrogatories on the part of the plaintiff:

1st. To the 1st Int. he saith:

I am 51 years of age, reside in New Orleans, my profession is that of a Physician. I have resided in this city for the past 39 years, and have practiced my present profession for the past 21 years.

2nd. To the 2nd Int., he saith:

I knew him, and have known him since 1854.

3rd. To the 3rd Int., he saith:

He committed suicide, as was established by the Coroner's inquest. I only saw his dead body when it was brought back to his residence. I was his family physician, and had been since 1855.

4th. To the 4th Int., he saith:

As to his general constitution, I will state that he was delicate. I treated him for scrofula, for the first symptoms of consumption, and for asthma, but he never learned from me, nor from any other physician in this city, nor did he suspicion or

have the remotest idea that he was affected with any such diseases himself; on the contrary, he always boasted and prided himself as being a strong, healthy and robust man.

5th. To the 5th Int., he saith:

The asthma he had was the dry nervous asthma; no expectoration whatever, and nothing connected therewith to make the patient believe he did have it. As to the first stage of consumption, there was no softening of the tubercules, and therefore no expectoration of tuberculous matter. As to the scrofula, I will state that his was very mild diathesis.

6th. To the 6th Int., he saith:

I did not impart to said Moulor a knowledge that he was affected with any of said three before mentioned diseases, out of a feeling of humanity, a rule I never deviate from in my practice whenever the mind of the patient might be affected thereby. The Company, defendant, was aware at the time they accepted Mr. Moulor that I was his family physician, and his, and had I been applied to for information as to his general health and constitution, or requested to fill out one of the usual blanks of examination by a physician, I certainly would have stated and made known that he had been affected with the diseases I have before mentioned I have never been absent from nor ceased practicing my profession in this city since 1854. My name was furnished Company, defendant, by Mr. Moulor in writing, as his physician, thus enabling the Company to get all desirable information from the proper source, which information thought proper neglecting to procure. I never knew he was insured until after his death.

JULES A. MATHIEU,
M. D.

Sworn to and subscribed before me, this 23rd day of February, A. D. 1876.

[SEAL] J. G. EUSTIS,
U. S. Commissioner Dist. of Louisiana

DISTRICT OF LOUISIANA,
PARISH OF ORLEANS,
CITY OF NEW ORLEANS. } ss.

I, John G. Eustis, at the City of New Orleans, Parish of Orleans, and State of Louisiana, do hereby certify that the said witness, Julius A. Mathieu, prior to the taking of said deposition on the Twenty-third day of February, A. D. 1876, was, by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in relation to the matter in controversy in the suit before mentioned in the caption to this deposition and in the inclosed commission, so far as he might be interrogated in relation thereto; and the said deposition was, on the Twenty-third day of February, A. D. 1876, in the City of New Orleans, and Parish of Orleans, in the State of Louisiana, sworn to, taken and reduced to writing, by my clerk, and signed by said witness in my presence.

I further testify that I am not, nor is my said clerk, of counsel, kin nor attorney to either party to this suit, nor interested in the event thereof.

Given under my hand and official seal, at said City of New Orleans, this Twenty-third day of February, A. D. 1876.

J. G. EUSTIS,
[SEAL] United States Commissioner.
District of Louisiana.

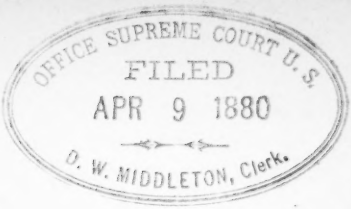
Commissioner's charges, postage, &c., $5 25-100, paid by plaintiff.

J. G. EUSTIS,
Commissioner, &c.

[SEAL]

Deposition on part of the Pl'ff opened in open court and filed, Mch. 3, 1876.

SAMUEL BELL,
Clerk.



EMILIE MOULOR

PLAINTIFF IN ERROR

vs.

AMERICAN LIFE INSURANCE COMPANY

DEFENDANT IN ERROR

Siddall Brothers, Printers

EMILIE MOULOR

PLAINTIFF IN ERROR

vs.

AMERICAN LIFE INSURANCE COMPANY

DEFENDANT IN ERROR

Siddall Brothers, Printers

Argument

What the plaintiff below (and in error) is pleased to call a "Statement of the Case" contains all the elements of confusion that were afterwards elaborated in an effort to construct the Argument. And what is the Argument? Or rather, the question ought to be whether in the face of long established principles, and in direct and stubborn conflict with repeated decisions, there is room for any argument at all? The attempt to show that a jury, under any circumstances, are judges of the "gravity of a disease" could at best only rest upon the assumption that men unlearned in a special and most important science were to usurp a peculiar province and be left in the dark to "**adjudicate** the "existence of a disease." It is a matter, too, of peculiar significance that the plaintiff's own, and only witness destroyed her case. And so long as the principle is maintained that a witness can not be contradicted by the party calling him — except in a few extraordinary instances, of which this is not one — the only recourse was to defame him. As long as he saw "no evidence of disease in him," he answered the purpose, but the moment he saw **too much** he became the "clairvoyant," and "gave his vanity full vent."

What

What **is** an "**adverse witness?**"

It is one who either from interest or prejudice entertains such hostility to a cause as would **inevitably** pervert his judgment or direct his testimony. Was Dr Mathieu such a witness? Let us see. He says: — "I knew him, and "**have** known him since 1854." "**I never knew he was "insured until after his death.**" This was the only witness examined as to any **merit** of the case, and as soon as his testimony disclosed an absolute defence the plaintiff pleaded "surprise," and asked as a favor, which was cordially granted her, leave to withdraw a juror, in order to have time to take further testimony; which testimony, it is submitted, is at the same time a statement and an actual demonstration of the defendant's case, for it puts it in absolute conformity with the law as this Court has repeatedly determined it. The rule is, not whether an applicant misstated — misrepresented — answered deceitfully — or **even** stated what he **believed** to be true, but simply and solely, whether what he did state was a **fact.**

But before, or rather **without** wandering into a field of mere speculation and **most** "ambiguous givings out" let us meet the only question in the case, denuded of the intricacies that have been ingeniously grouped about it. That question is, Was this application a **warranty** of the truthfulness

fulness of his answers, on the part of the assured? **What is a warranty?** A warranty is an **unconditional** agreement that any statement or representation, upon the full faith of which a contract is executed, shall be in **all** respects **strictly and entirely true.** Whether it is implied or expressed, it is **always unconditional.** The law may infer it, or the party may write it, but it is **absolute** in either case. It never can be explained away, or questioned at all, because it rests upon the most strict and literal meaning of its terms. It is itself the typical act of **assurance** It is not removed even to the short distance of a guaranty, for that **may** be inquired into to explain and relieve other and questionable responsibilities, but any contract that has the badge of an **express warranty** upon it explains the mutual obligation of the parties by the necessary words of its constitution — "**liable at all events.**"

The attempt on the part of the plaintiff to distinguish between what is "**fair**" and what is "**true,**" taken in connection with the whole testimony seems to be little or nothing more than an offer to show that the assured was in ignorance of his state of health, from the fact that his attending physician had never **told** him he was diseased. What difference could that make? The only question is, were the answers true in point of fact? They were not, as has been pretended, representations or statements which might perhaps come under a very different rule of construction, and deserve some excuse: for it could very easily chance that a man should answer

swer ignorantly, while innocently; but the basis, the consideration even, of the Contract is that the answer shall be nothing more nor less than **true**. **Unconditionally** and **absolutely** true.

Now it is said, and the statement is with some show of confidence relied upon, that "the policy does not contain the "word warrant, and the application, which could create no "**independent** liability, but must be brought into the class "of representations by the limitation of the policy itself, "employs it but once."

Let us see. In the first place the application is not an "independent liability," for before the applicant is asked a single question, he agrees that his statement shall form a part of the contract, and when that statement has been fully made and he has "**reviewed his answers**," he further says: —

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned, that this application shall form a part of the contract of Insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void and all payments made thereon shall be forfeited to the Company. And it is further agreed, that if at any time hereafter the Company shall discover that any of said answers are untrue or evasive, or that there has been any concealment of facts, then, in every such case, the Company may refuse to receive further premiums on any policy so granted

granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid.

How is the falsehood on the part of the assured made "apparent?" **Solely** by a witness of the claimant's own selection. Now let us examine in brief though fair detail **his** testimony; because the plaintiff has twice consented to rest her case upon the evidence of one of whom the defendant had no knowledge and whose cross-examination could only be conducted by the unsatisfactory process of written interrogatories.

Dr Mathieu was not only a most favorable, but a cordial witness for the plaintiff. He had known the assured since 1854, and had attended him professionally since 1855, and is designated in the answer to the thirteenth question of the Application for Insurance, as his "usual medical attendant." Now, as the policy is either to be forfeited or enforced upon the **truth** of the applicant's answers, the fairest way is to take the plaintiff's own chosen witness in order that she may really be judged out of her own mouth.

The seventh question of the Application is as follows: —

7.- Has the Party ever been afflicted with any of the following diseases? Answer Yes or No to each.

Consumption? No.

Insanity? No.

Gout

Gout? No.
Rheumatism? No.
Scrofula? No.
Palsy? No.
Convulsions? No.
Dropsy? No.
Small Pox? No.
Yellow Fever? Yes.
Fistula? No.
Rupture? No.
Asthma? No.
Spitting of Blood? No
Any diseases of the Lungs or Throat? No.
Or of the Heart? No.
Or of the Urinary Organs? No.

Was this a **fact**? Dr Mathieu testifies: —

I had attended him as his physician since 1855, **for chronic asthma manifestations of the first stage of consumption**; this was in 1858 and 1859; afterwards for slight indispositions from time to time, besides **the asthma to which he was constitutionally subject. I also treated him for scrofula all the time.** The last disease for which I was called previous to his death was on the occasion of the pains in the head, which he suffered in the night from December 31st, 1872, to January 1st, 1873. My first visit to him as a physician was in 1855, for asthma.

Is

Is it fair to call this "the non-existence of disease, but only its predispositions?"

The plaintiff rests her case, not where it belongs, upon the legal interpretation and responsibility of a warranty, but actually abandons it when she leaves it to the protection of a vain attempt to draw some distinction between that and a representation, because even in that refuge she is confronted with the very consideration matter of the contract, for it was mutually declared and agreed

That if the **representations** and answers made to this Company in the **application** for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect or there has been any **concealment** of facts, then and in such case this policy shall be null and void.

The sixteenth question in the Application is as follows: —

16.- Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fraudulent answers or any suppression of facts in regard to health, habits or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon?

To this he answered, Yes.

Can

Can it then be said with any show of reason, or indeed with any too much fairness of expression, that "the representa-"tions, conditions and warranties are designed to **extort** "from the insured all that he knows, or all that he can find "out about himself. The insurers put him under **pressure** "in order to **force** out of him the information which enables "them to act advisedly. This is entirely consistent with the "plan of insurance. But the limit is reached when the in-"sured's means and resources of knowledge are are ex-"hausted. **Then his part is done.**"

Only a single point remains to be noticed. It is said: — "The policy should be governed by the law of Pennsyl-"sylvania * * * * where the contract "was to be performed," and as a consequence it was necessary to put some little emphasis upon the plaintiff's statement that — "The learned Judge was dissatisfied with the "verdict; he conceived that the jury had usurped his func-"tiona and decided the law of the contract."

Now, whether or not it is necessary for the Court to inform itself as to what may anywhere be the provincial law upon this subject, the Supreme Court of Pennsylvania has announced its decision in a recent case* — not yet reported — in perfect conformity with the rulings of this Court in its last two judgments,† viz: — That the falsity of the answers in any respect or degree removes even the consideration of the case from both court and jury.

Under

Under no circumstances therefore is the plaintiff's claim left to make its way in the dark between contracts that are bona fidei and those that are stricti juris, for the distinction at one time only insisted upon has now been made abundantly evident. It rests not only as the plaintiff herself says, where "morals put it," but where the **law** has placed it. Its merits can be determined by only one test (We quote MR JUSTICE HUNT): —

"First, Was the representation made?

"Second, Was it **false**?

HENRY HAZLEHURST

ISAAC HAZLEHURST

for defendant in error

APPENDIX

APPENDIX

APPLICATION FOR INSURANCE

AND

STATEMENT OF PARTICULARS

ANSWERS OF MEDICAL EXAMIMERS

AND OF AGENTS

APPLICATION

APPLICATION F

In the AMERICAN LIFE INSUR

STATEMENT OF PARTICULARS RESPECTING THE PERSON WHOSE LIFE IS PROPOS
OF INSU

1.- What is the Name and Residence of the Person for whose benefit the Insurance is to be effected?

☞ Write all the names in full.

If a married woman or widow, what was her maiden name?

☞ Write Christian name in full.

State Relationship to Party proposed to be insured.

2.- What is the Name, Residence, and Occupation, or Trade of the Person whose life is proposed to be insured?

☞ Write all names in full.

3.- Place and Date of Birth of the Person whose life is proposed to be insured?

Age, next birth-day?

4.- Are the Party's parent's living? If so, how old? If not, at what age and of what disease did they die?

State the Father's name in full.

5.- Has the Party ever been addicted to the use of opium or other stimulants, or been intemperate in the use of alcoholic or other beverages? Are the Party's habits now regular and temperate?

OR INSURANCE

ANCE COMPANY, of Philadelphia,

ED FOR INSURANCE, AND WHICH STATEMENT FORMS A PART OF THE CONTRACT RANCE.

Name, Emilie Moulor,
Residence, New Orleans,
County of Orleans, State of La.

Married. Emilie Dilcroix.

Wife & children.

Name, Jean Bernard Moulor dit Louis Moulor.
Occupation or trade, Merchant.
Residence, New Orleans,
County of Orleans, State of La.

Place, Germ. France.
County of State of
Date of Birth, September 19th, 1819.
53 years.

Father living; about years old.
Mother living; about years old.
Father died, aged about 72 years, of old age.
Mother died, aged about 65 years, of Don't know.
Francisca Moulor.

No.

Regular & temperate.

6.- Has

6.- Has the Party been successfully vaccinated?

7.- Has the Party ever been afflicted with any of the following diseases?

☞ Answer Yes or No to each.

8.- Has the Party experienced any wound, hurt or other serious bodily injury?

9.- Is the Party now in good health, and does he usually enjoy good health?

10.- Has the Party's father, mother, brothers or sisters been afflicted with consumpton, or any other serious family disease, such as scrofula insanity, &c., &c.?

11.- How many Brothers and Sisters of the Party are now living? What the ages and state of health?
How many dead; at what ages and of what diseases did they die?

12.- How long since the Party was attended by a Physician?
For what disease or diseases?

13.- Give the name and residence of the Party's usual medical attendant.
And the name and residence of one Intimate Friend.

14.- Is there any circumstance which renders an Insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predisposition, constitutional infirmity, or other known cause, or any other circumstance or information with which the Company ought to be made acquainted?

15.- Has a proposal ever been made for insuring the Party's life in this or any other office, and if so, was it accepted or declined? If now insured, state in what company, and for what amount?
Has the Party ever heen Medically Examined, with a view to Life Insurance?

16.- Has the Applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed, that any untrue or fraudulent

He has.

Insanity? No. Gout? No. Rheumatism? No. Scrofula? No. Palsy? No. Convulsions? No. Dropsy? No. Small Pox? No. Yellow Fever? Yes. Fistula? No. Rupture? No. Asthma? No. Spitting of Blood? No. Consumption? No. Any diseases of the lungs or throat? No. or of the heart? No. or of the urinary organs? No.

No.

He does.

No. Not since since childhood

Brothers living.	Ages	Health
Sisters living.	Ages 4	Health
Brothers dead.	Ages	Disease
Sisters dead.	Ages 2	Disease dont know died in Europe

Not since the year 1847 when he had the yellow fever

Dr Mathieu of New Orleans

No.

No.

The Party is now insured in the following Companies, viz:

No $. No $

No $. No $

No $. No $

Answers

answers or any suppression of facts, in regard to health, habits, o
circumstances, or neglect to pay the premium on or before the tim
it becomes due, will, according to the terms of the policy, vitiate th
same, and forfeit all payments made thereon?

17.- Sum to be Insured (write words in full)
Premium payable Annually.

18.- Term for which the Insurance is required?

19.- What plan of Insurance is desired?

It is hereby Declared and Warranted That the above are fai
agreed by the undersigned, that this application shall form a part of the co
any untrue or evasive statements, or any misrepresentation or concealmen
void; and all payments made thereon shall be forfeited to the Company.
discover that any of said answers or statements are untrue or evasive, or th
Company may refuse to receive further premiums on any policy so granted
forfeited as aforesaid.

AND IT IS FURTHER DECLARED by the undersigned, that the party mak
for Insurance, to the full amount applied for.

DATED at New Orleans,
WITNESS: S. A. Seeskind.

☞ A husband may sign for his wife, thus: "Mary Smith, by John Smith." Where insurance is for the benefit of minor children, it should be signed "John Smith, as guardian (or trustee) for Mary A., Susan G., and Charles Smith, my children," or "children of————."

☞ When the policy is taken in the person's own name, one signature is sufficient.

Write Christian names in full

Yes.

Ten Thousand Dollars.

Table No. 6. Premium, $425.50.

Life term.

Stock plan.

and true answers to the foregoing questions; and it is acknowledged and ntract of Insurance, and that if there be, in any of the answers herein made, of facts, then any policy granted upon this application shall be null and And it is further agreed, that if at any time hereafter the Company shall at there has been any concealment of facts, then, and in every such case, the upon this application, and said policy shall be null and void, and payments

ng this application has an "insurable interest" in the life above proposed

this 17th day of June 1872

Signature of the person or persons for whose benefit the Insurance is to be effected. } EMILIE MOULOR

L MOULOR

Signature of the person whose life is proposed to be insured. }

Write Christian names in full

Questions

QUESTIONS TO BE CAREFULLY ANSWERED

1.- How long have you been acquainted with

2.- Do you see h frequently? Have you given h medica attendance, if so, for what disease or diseases?

3.- Has the Party any constitutional infirmity, or hereditary predisposition to disease, or is he subject to pulmonary complaints, or any other complaint or disease that tends to shorten life?

4.- What is or has been the condition of the Party's Family as to constitutional vigor, health, &c.?

5.- Do you know if he has been and is now regular and temperate in h habits?

Dated

FRIEND'S

I Certify, That I have been personally acquainted with of New Orleans during the temperate, and that he is now in good health, and does ordinarily enjoy circumstanee, affecting his, calculated to make an insurance on his life mo

DATED, New Orleans, June 18th, 1872.

(CONFIDENTIALLY) BY THE FAMILY PHYSICIAN

Signature

CERTIFICATE

Louis Moulor

last 20 years, and do believe that his habits of living are good health; and that I know of no constitutional infirmity or other re than usually hazardous, except

SIGNATURE JOHN H. FELULID

Questions

QUESTIONS TO BE ANSWERED

Of the AMERICAN LIFE INSUR

Respecting *L. Moulor,*
in an Application dated *June 17th,* *1872.*

☞ A clear and explicit answer is to be given to each of the follow questions bearing upon the case as he may deem proper, and to give any examination in all respects thorough, exact, and circumstantial. He shoul the examination, and note any points in the same requiring special attenti person examined is to be filled up and presented to the Medical Examiner, careful to ascertain whether the answers to the questions in the Applicati given; if not, they are to be made so *before* proceeding with the examinati of the Medical Examiner.

1.- Description of the person examined. Height? 5 ft. in. appearance — healthy, or unhealthy? Healthy. Circumference Inspiration, 36 inches. Other remarks,

2.- Is the person examined dumb, or deaf, or blind (whether partially or wholly) or has he any natural or other infirmity?

3.- If he has ever resided out of the United States, state where, and for what periods?

Has he ever resided south of the southerly line of Tennessee? is he acclimated to such residence, and how?

4.- Are there any indications of disease in the *head*, external or internal?

BY THE MEDICAL EXAMINER

ANCE COMPANY, of Philadelphia,

whose life is proposed for Insurance in the sum of $10,000.

ing questions, and the Medical Examiner is instructed to ask such other such further information as may be elicited thereby; and to make the d carefully read the accompanying Application for Insurance *before* making on. (The form of certificate of the Personal or Family Physician of the if he considers it requisite.) The Medical Examiner should be particularly on, from the 5th to the 16th inclusive, are correctly and understandingly on. The signature of the person examined is to be attached in the presence

Weight? 145 lbs. Figure? Temperament? Sanguine. General of the Chest? Under forced Expiration, 34½ inches. Under forced

No.
Sordosis, acquired when 14 years of age.

Born in France.

Yes.
Had yellow fever in 1847.

No.

Are

11.- Do you believe him to be entirely free from any and every disease o
disorder whatsoever?

12.- Do you believe him to be strictly temperate and correct in his habit

13.- Do you consider him in all respects safely insurable?
Do you advise the risk?

.....

Date of the above examination.
at (Place), New Orleans,
on the 18 day of June, 1872.

isease or es.

habits. I do.

Yes, I do.

Yes, I do.

Signature of the person examined to be attached in the presence of the Medical Examiner.

Signed, E. W. THURM, M. D.,
Medical Examiner.

Where Graduated, Wurzburg.
When Graduated, 1862.

Agents are requested to give specific (confidential) Answers to every one of the Application, they must

1.- When did you last see the person whose life is proposed to be insured?

2.- Are you intimately acquainted with him? if not, have you obtained such information as will enable you to ask the following questions correctly?

3.- Is he in a reputable situation of life, and of temperate habits?

4.- Do you consider his occupation or manner of living injurious to his health?

5.- Do you believe that he is now in good health, and has a healthy constitution?

6.- Are you aware of any particular circumstance touching his past or present health and habits of life, which would make it unsafe to insure his life?

7.- Has his family, to your knowledge, been afflicted with Pulmonary Consumption, or any other disease that tends to shorten life?

8.- Do you consider him in all respects a proper person to be insured, and do you recommend him as such?

DATED, June 18th, 1872.

these Questions, and if they have anything else to state, on forwarding the communicate it to the office.

ed? Some time since.
uch
cor- Have known him well about 8 years.
He is.
his No.
on- Yes; asked Dr. Lewis particularly about his case. Says he is an excellent risk.
or By a fall in his youth; but since I have known him, has been a very healthy ure man.
on- Not as I can learn.
and do, decidedly.

JNO. D. SCOTT, Gen'l Agent.

Questions

QUESTIONS TO BE ANSWERED

Of the AMERICAN LIFE INSUR

Respecting *L. Moulor,*
in an Application dated *June 17th, 1872.*

☞ A clear and explicit answer is to be given to each of the follow questions bearing upon the case as he may deem proper, and to give any examination in all respects thorough, exact, and circumstantial. He shoul the examination, and note any points in the same requiring special attenti person examined is to be filled up and presented to the Medical Examiner, careful to ascertain whether the answers to the questions in the Applicati given; if not, they are to be made so *before* proceeding with the examinati of the Medical Examiner.

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2.- Is the person examined dumb, or deaf, or blind (whether partially or wholly) or has he any natural or other infirmity?

3.- If he has ever resided out of the United States, state where, and for what periods?

Has he ever resided south of the southerly line of Tennessee? is he acclimated to such residence, and how?

4.- Are there any indications of disease in the *head*, external or internal?

BY THE MEDICAL EXAMINER

ANCE COMPANY, of Philadelphia

whose life is proposed for Insurance in the sum of $10,000.-

ing questions, and the Medical Examiner is instructed to ask such other such further information as may be elicited thereby; and to make the d carefully read the accompanying application for Insurance *before* making on. (The form of certificate of the Personal or Family Physician of the if he considers it requisite.) The Medical Examiner should be particularly on, from the 5th to the 16th inclusive, are correctly and understandingly on. The signature of the person examined is to be attached in the presence

Weight? 145 lbs. Figure? Stout. Temperament? Nervous. General of the Chest? Under forced Expiration, 34 inches. Under forced

No.

Has double curvature of spine.

Born in France.

Yes.

Yes. Has had yellow fever.

None.

Are

Are there, or have there ever been, indications of any disease of the brain or nervous system, as by vertigo, affected speech, irregular action of the muscles, or by affection of any kind?

Are there, or have there ever been, any indications of insanity, or any mental disorder, or any tendency thereto, hereditary or acquired?

5.- How many INSPIRATIONS are there in a minute?

Is the RESPIRATION full, free, distinct, and perfectly healthy in every part of both lungs?

Are the RESPIRATORY ORGANS free from any suspicion of disease?

6.- Is he free from any tendency to cough, catarrh, vitiated expectoration, spitting of blood, difficulty of breathing, or disease of the throat?

7.- What are the rates, strength, and volume of the pulse?

Is the heart's action uniform, free, and unobstructed?

Are its sounds and impulses healthy?

Are the heart and blood-vessels free from any indications of disease?

8.- Has he now, or has he had, any diseases of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? If the person has a rupture, he must wear a truss, and so state.

If a female, is she pregnant? How far gone, and whether first time or otherwise?

9.- If he has experienced any severe injury, state what, and its effects upon constitution and health?

If he has ever been affected by any severe constitutional disease, state what, and its effects?

10.- If there be any predisposition, whether hereditary or acquired, to any constitutional disease, state to what disease?

No.
No.

No.
No.

17 p.
It is on the right side — with ordinary respiration, and on the left with forced respiration.
Yes.

Yes.

80, full, soft, normal.
It is.
Yes.
Yes.

No.
No.

Had a fall at 14 years of age and was sick 4 or 5 yrs. with double curvature of the spine resulting. Has completely recovered and has the appearance of robust health now.
None other than above.

None.

11.- Do you believe him to be entirely free from any and every disease or disorder whatever?

21.- Do you believe him to be strictly temperate and correct in his habits?

13.- Do you consider him in all respects safely insurable?

Do you advise the risk?

Date of the above examination.
at (Place), New Orleans,
on the 18th day of June, 1872.

I do.

I do.

I do.

Yes.

Signature of the person examined to be attached in the presence of the Medical Examiner.

Signed, J. S. LEWIS, M. D.,
Medical Examiner.

Where Graduated,
When Graduated, 18

Agents are requested to give specific (confidential) Answers to every one of
Application, they must e

1.- When did you last see the person whose life is proposed to be insured?	T
2.- Are you intimately acquainted with him? if not, have you obtained such information as will enable you to ask the following questions correctly?	I
3.- Is he in a reputable situation of life, and of temperate habits?	H
4.- Do you consider his occupation or manner of living injurious to his health?	N
5.- Do you believe that he is now in good health, and has a healthy constitution?	I
6.- Are you aware of any particular circumstance touching his past or present health and habits of life, which would make it unsafe to insure his life?	N
7.- Has his family, to your knowledge, been afflicted with Pulmonary Consumption, or any other disease that tends to shorten life?	N
8.- Do you consider him in all respects a proper person to be insured, and do you recommend him as such?	d

DATED, June 18th, 1872.

these Questions, and if they have anything else to state, on forwarding the communicate it to the office.

red? This day.

such

cor- I have known him for 8 years.

He is.

his No.

con- I do.

st or No.

nsure

Con- Not to my knowledge.

d, and do.

S. A. SEESKINS, for Agent

POLICY OF INSURANCE

Policy

POLICY OF INSURANCE

Number. Shares.

American Life Insurance Company

Philadelphia.

Charter Perpetual. **Incorporated 1850.**

This Policy Witnesseth, That the AMERICAN LIFE INSURANCE COMPANY, in consideration of the representations made to them in the application for this Policy, and of the payment of them in hand of ..... Dollars, and of the further ..... premium of ..... Dollars, on the ..... day of ..... in each and every year during the continuance of this Policy, ...

Do Insure the Life of .....

of ..... in the County of .....

State of ..... in the sum of ..... Dollars, for the term of ..... natural life.

And the said Company do hereby Promise and Agree, well and truly to pay, or cause to be paid, the said sum insured, at their office in the city of Philadelphia, to ..... executors, administrators and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of the said .... deducting therefrom any indebtedness to the Company, and any unpaid balance on the premium of the current year.

Provided

Provided always, and it is hereby declared to be the true intent and meaning of this POLICY, and it is accepted by the assured upon these express conditions, that in case the said ..... shall, without the consent of this Company previously obtained, in writing, visit those parts of the United States which lie South of 32 degrees of North Latitude, between the first of June and the first of November, or shall, without such previous written consent, enter into any military or naval service whatsoever, (the militia not in actual service excepted); or shall, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam engine in any capacity, or as a Conductor, Brakeman, or Hand upon a Railroad, or as an Officer, Hand or Servant of any steam vessel, or in case ..... shall die by ..... own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium or other narcotic, or in the violation of any law of any of these States or of the United States, or of any state or country, then this POLICY shall be void, null, and of no effect, except that in case ..... shall die by ..... own hand, while insane, the amount to be paid by the Company, on this Policy, shall be the amount of the premiums actually received thereon.

And it is hereby Declared and Agreed, That if the representations and answers made to this Company, in the application for this POLICY, upon the full faith of which it is issued, shall be found to be untrue in any respect or that there has been any concealment of facts, then and in such case, THIS POLICY shall be null and void; or in case the said premiums shall not be paid at or before 12 o'clock (noon) on the several days specified and appointed for the payment

payment of the same, at the office of the Company, in the city of Philadelphia, or to Agents, when they produce Receipts signed by the President or Treasurer, and with the corporate seal of the Company, then and in every such case, the said Company shall not be liable to the payment of the sum insured, or any part thereof, and the POLICY shall cease and determine, and all payments made shall be forfeited to the Company; but after three or more full years' premiums have been paid hereon, the Company will issue a paid up Policy payable at death, for about the amount of the premiums paid, provided application is made for the same, and the Policy, while yet in force, be duly surrendered to the Company.

And it is also Agreed, That this Policy, and the insurance effected, shall be subject to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were incorporated in this Policy.

☞ No assignment of this Policy shall be of any force or effect, unless approved by the Company, and endorsed thereon by the Secretary or other authorized officer, within thirty days from the date thereof; otherwise the premiums shall be considered sunk for the benefit of the Company.

THIS POLICY shall not be valid until the actual payment of the premium has been made, and receipted for at the bottom of this Policy by the Treasurer, or by .....
..... Agent for .....

In Witness Whereof, the President of the said AMERICAN LIFE INSURANCE COMPANY, on behalf of the BOARD OF TRUSTEES, has hereunto subscribed his name, attested by the Secretary, and has caused the common

common seal of said Company to be affixed, at the office in Philadelphia, this ..... day of ..... eighteen hundred and seventy .....

..... *President.*

Attest,

..... *Secretary.*

RECEIVED ..... Dollars, being the first above-named premium.

CONDITIONS.

I. Policies expire at noon on the last day of the period for which payment has been made.

II. If a change takes place in the *name* or in the *residence* of the insured, notice of such change must be given to the Company.

III. Agents are not authorized to make contracts for the Company, not to write upon the Policy, (except his signature when necessary to the first receipt of premium—see Condition No. 5), nor to waive forfeiture of the same.

IV. In case of the assignment of a Policy, (whether as security or otherwise), satisfactory proofs of the amount of the assignee's interest in the insured life, must be furnished with the proofs of death.

V. Receipts for Premiums, excepting the first, (to be found on the face of this Policy), will invariably be given on a separate

arate paper, and will not be valid without the seal of the Company.

PROOFS OF LOSS REQUIRED.

1. A certificate of the physician who attended the insured in last illness, stating particulary the nature of the disease, its duration, and the date and hour of decease; apparent age, height, complexion and general appearance.

2. Certificate of a friend or intimate acquantance, stating the disease of which the party died, how long was sick, a knowledge of such death, and how obtained, and the time of death.

3. Certificate of sexton or undertaker who superintended the funeral of insured, and saw remains interred; stating apparent age, height, complexion and general appearance.

The said several Certificates must be sworn or affirmed to, before some magistrate, or public officer empowered to administer an oath, accompanied by a certificate, in conformity to the Act of Congress, of the authority of the officer who administers the oath.

THE NECESSARY RECEIPT ON THE PAYMENT OF THE POLICY.

When it is a Policy on the life of a husband, for the benefit of a wife, or the life of a wife for the benefit of a husband, or of a party insuring the life of another, or in case of an assigned Policy, a receipt on the Policy from the party legally entitled to the payment, is all that is required. But when a party insures his own life, in case of death the insurance must be collected by an executor or administrator legally authorized to settle the estate, and the *official* certificate

cate of his appointment by the proper tribunal to that effect, must be presented at the office of the Company, with the Policy duly receipted by said executor or administrator.

☞ Acceptance of the premium due on this Policy by the *Company* or its *Agents*, after the day *upon which it is due* must be considered as acts of grace and courtesy, and *in no wise* to be construed as forming a precedent for future payments or a *waiver* of the forfeiture of the Policy according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due. The Company will not be liable for any omission to notify the assured of the time when the premiums fall due. Agents of the Company are in no case authorized to make, alter or discharge contracts or waive forfeiture.

ASSIGNMENT

For value received, ... hereby transfer and assign unto ..... executors, administrators and assigns, all ..... right, title, and interest in this Policy of Insurance, and to the payments made therefor, and all benefit and advantage to be derived therefrom.

WITNESS ..... hand and seal at ..... this ..... day of ..... 187 .....

Signed and delivered in presence of }
..... } ..... [SEAL]

APPROVED this day of 187

Secretary.

No. .....

ORDINARY LIFE POLICY.

AMERICAN LIFE INSURANCE COMPANY,

Walnut St., S. E. cor. of Fourth,

PHILADELPHIA.

CHARTER PERPETUAL.

Insurance on the life of .....

Amount, $ .....

Date of Policy .....

Term of .....

Payments due on the ..... *day of* .....

in each and every year.

..... *Payment,* $ .....

(Ed. 1872, A.)

Endorsement

ENDORSEMENT ON POLICY

J. STOCK

AMERICAN LIFE INSURANCE COMPANY

Walnut Street, S. E. Cor. Fourth, Philad'a

Policy No. 31,916

Date of Policy, - - June 17, 1872
Application dated - - " " "
Benefit of - - Emilie — wife
Residence, - - New Orleans, La
Life of - - Louis Moulor
Occupation, - - Merchant
Age nearest birth-day, - - 53 years
Term of - - Life
Sum insured, - - $10,000.-
Anl Premium, - - - - $425,50
Policy Fee and U. S. Tax, - - $ 2.00
R. T & R. R., - - - - $427.50

SCOTT, - - Agent
..... Residence

N. B. – The Agent is requested NOT to fill up the above blanks
(Ed. July, 1871.)

INTERROGATORIES

AND

DEPOSITIONS

Commission of 10th July 1873

Rule

RULE FOR COMMISSION

EMELIE MOULOR *a citizen of the State of Louisiana* *vs.* AMERICAN LIFE INSURANCE COMPANY *a corporation under the Laws of the Commonweath of Pennsylvania*	*Circuit Court of the United States for the Eastern District of Pennsylvania* *April Sess., 1873* *No. 19*

And now, to wit: June 24th, 1873, James Parsons, attorney for the plaintiff, enters a rule for a commission in the above case to take testimony at New Orleans, in the District of Louisiana, on fifteen days notice.

Commissions to New Orleans

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE THIRD CIRCUIT, OF APRIL SESSION 1873, No. 19.

EMELIE MOULOR
a citizen of the State of Louisiana

vs.

AMERICAN LIFE INSURANCE COMPANY
a corporation under the laws of the Commonwealth of Pennsylvania

THE PRESIDENT OF THE UNITED STATES

To M. Eusebe Bonny, Notary Public, No. 44 Exchange Place, New Orleans, and the firm of Race Foster and E. T. Merrick, attorneys at law, corner of Camp Street and Commercial Place, New Orleans, Louisisana: —

KNOW YE, That, in confidence of your prudence and integrity, we have given unto you and by these presents do give unto you full power and authority, in pursuance of a rule

rule lately made in the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, in a certain action of debt therein depending, wherein the said Emelie Moulor is plaintiff and the said American Life Insurance Company is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said parties respectively as witnesses in the said action and then and there to examine them, on their respective oath or affirmation, on certain interrogatories and cross-interrogatories hereunto annexed touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Nathan Clifford, Associate Justice of the Supreme Court of the United States,
[SEAL] at Philadelphia, the tenth day of July, A. D. 1873, and the ninety-eighth year of the independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court.

[MARGINAL NOTE: — 1873. July 28th. Plaintiff names as Commissioner, P. Charles Cuvellier, Notary Public, No. 140 Gravier Street, New Orleans, in place of M. Eusebe Bonny, who is at present sick and unable to attend to the duties of the Commission, and his name is therefore substituted accordingly.]

Interrogatories

INTERROGATORIES

EMELIE MOULOR *a citizen of the State of Louisiana* *vs.* AMERICAN LIFE INSURANCE COMPANY *a corporation under the Laws of the Commonwealth of Pennsylvania*	*Circuit Court of the United States for the Eastern District of Pennsylvania* *April Sess., 1873* *No. 19*

Interrogatories to be exhibited to witnesses to be produced, sworn or affirmed, and examined, on the part of the plaintiff in the above case, before Commissioners to be named in a commission to be issued out of the said Court to New Orleans, in the District of Louisiana: —

First: —

What is your age, residence and occupation, and how long

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTICT OF PENNSYLVNIA IN THE THIRD CIRCUIT: —

DEPOSITION OF WITNESSES produced sworn and examined on the Ninth (9th) day of October in the year of Our LORD One thousand eight hundred and seventy three at the Office of P. Charles Cuvellier Notary Public No. 140 GRANER STREET in the CITY of NEW ORLEANS in the STATE of LOUISIANA by virtue of a COMMISSION issuing from the CIRCUIT COURT of the UNITED STATES in and for the EASTERN DISTRICT of PENNSYLVANIA in the Third Circuit to P. Charles Cuvellier Notary Public No. 140 Graner Street New Orleans, and the firm of Race Foster & E. T. Merrick Attorneys at Law Corner of Camp Street and Commercial Place New Orleans, Louisiana, dircted for the examination of Witnesses in a certain cause depending in said Court wherein Emilie Moulor a Citizen of the State of Louisiana is plaintiff, and the American Life Insurance Company a Corporation under the laws of the Commonwealth of Pennsylvania is defendant.

JULES A. MATHIEU, of the City of New Orleans aged forty-eight years or thereabouts being produced sworn and examined on behalf of the plaintiff deposeth as follows:—

1.- To the first Interrogatory on the part of the plaintiff he answers as follows: —

My

long have you had your present residence, and how long have you pursued your present occupation?

Second: —

Were you acquainted with the late Louis Moulor, the husband of Emelie Moulor, the plaintiff in this action?

Third: —

How long have you been acquainted with the said Louis Moulor?

Fourth: —

In what place or places did he live, and how long did he live in each place?

Fifth: —

In what business or businesses was he engaged, and what was the period during which he was engaged in each business?

Sixth: —

My age is forty-eight years, my residence, New Orleans and my occupation that of a physician. I have resided in New Orleans since the year 1837 and have persued my occupation since the year 1854.

2.- To the Second Interrogatory on the part of the plaintiff he answers as follows: —
I was.

3.- To the Third Interrogatory on the part of the plaintiff he answers as follows: —
Ever since the year 1855.

4.- To the Fourth Interrogatory on the part of the plaintiff he answers as follows: —
Since I have known he resided in New Orleans except his taking two trips to Europe each of a few months and on business.

5.- To the Fifth Interrogatory on the part of the plaintiff he answers as follows: —
When I first knew him he kept leather store on Chatre Street in the latter part of 1858 or the beginning of 1859 he opened a tobacco store in partnership with Mr. Fleury.
His connection with Mr. Fleury ceased in 1865 and in that year he went into partnership in the same business with Mr. Fidel, and that partnership ceased to exist in 1866 he all that time continuing to keep his leather establishment — in the leather business in 1861 he took into partnership Mr Dumestre and this association ceased on the 1st of May 1872 by contract but in fact only on the 23d of that same month — from said month of May 1872 Moulor was no longer in the leather business in the year 1869 he had bought

Sixth: —

What was the character which he sustained in business?

Seventh: —

What was the character which he sustained in domestic and social life?

Eighth: —

What was the result of his business operations?

Ninth: —

bought a plantation in the Parish of St. James a sugar plantation which was sold to Mr. J. Frotot about a week before the death of Moulor — At the time of his death he was engaged only in the Tobacco business keeping a store at the corner of St. Levee & Bienville Streets and a factory in the Third District of New Orleans.

6.- To the Sixth Interrogatory on the part of the plaintiff he answers as follows: —

Up to the time of his death he sustained a very good character — that of a very honorable man.

7.- To the Seventh Interrogatory on the part of the plaintiff he answers as follows: —

A very good character — a good husband, good father, always ready to assist his friends in need, and very charitable generally — he was of very sober habits.

8.- To the Eighth Interrogatory on the part of the plaintiff he answers as follows: —

His business was thriving as long as it was limited to the leather store; with the Tobacco store he discovered in 1865 great losses which his partner Mr. Fleury could not account for and that was the occation of a law suit by him against Fleury the same was the case with Fleury's successor Mr. Fidel, great losses occuring which Fidel could not account for and that gave rise to another suit against Fidel, then again his Sugar Plantation for the management of which he had taken Mr. Carete as a partner was a constant source of increasing expenses and during the four years that he owned the plantation not a single good crop was realized.

9.- To

Ninth: —

What effect did his business have upon his health, and his disposition?

Tenth: —

What was the immediate cause of his death, and what were the circumstances which attended it?

If in reply to the first interrogatory you shall have answered that you are a medical expert: —

Eleventh: —

9.- To the Ninth Interrogatory on the part of the plaintiff he answers as follows: —

It had a very depressing effect on his mind and more and more so as he realized he was sinking and in the latter part of December 1872 he exhibited to me in several instances that he was gradually losing *moral* judgment: — from the 31st of December 1872 to January 1873 during the night he woke up complaining of a most intense pain in his head — I was sent for and in the morning he said he had felt as if he had been losing his mind in that night — but it vanished in the morning.

10.- To the Tenth Interrogatory on the part of the plaintiff he answers as follows: —

On the 3rd of January 1873 at about 10 o'clock in the morning he was seated in a horse car which plies from the terminus of the Esplanade Street line to the terminus of the Canal Street line running on the Mutanie Ridge Road — he was at the Bayor St. John end of the Road alone in the Car, not even the driver being present, the driver was in a bar room, across the road when suddenly the report of two pistol shots was heard, the smoke in the car caused the driver to come back to it when he found together with some few persons who had followed him, the body of Mr. Moulor lying on his face on the floor of the car and a pistol a few inches from his right hand — he was then dead — The above facts I state as having been elicited at the inquest. His corpse was brought to his home where I saw it. I examined it and to my judgment the death had taken place from the effect of two pistol shot wounds one ball entering the mouth passing through the brain and made its exit on the right side of the head the other ball had entered the inner

Eleventh : —

What was the state of his health and his physical condition at the time of his death?

Twelfth : —

If he killed himself, what was his mental and moral condition previous to and at the time of the act of self-destruction?

Thirteenth : —

Was he or was he not able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing?

Fourteenth : —

Was he or was he not capable of forming a rational judgment about the act he was doing?

Fifteenth : —

Do you know anything else which may be material or of use

ner side of the right eye just below the eye-brow that ball also passing through the brain — either of the wounds would be sufficent to destroy life.

11.- To the Eleventh Interrogatory on the part of the plaintiff he answers as follows: —

Ordinary — nothing abnormal had taken place in his physical condition except the pains suffered by him in the head, as stated before, on the night from December 31st, 1872, to January 1st, 1873.

12.- To the Twelfth Interrogatory on the part of the plaintiff, he answers as follows: —

He had pretty much lost the faculty of moral judgment — in fact, he could not form a correct judgment — he would at times begin sentences and then find himself in the impossibility of finishing them, losing sight entirely of the subject of his thoughts, which would make him very nervous. These aberrations were the more striking in his case because naturally he was of a very cold, sedate turn of mind, always exempt from any enthusiasm or excitement whatever.

13.- To the Thirteenth Interrogatory on the part of the plaintiff, he answers as follows: —

I should think not.

14.- To the Fourteenth Interrogatory on the part of the plaintiff, he answers as follows: —

Again, I should think not.

15.- To the Fifteenth Interrogatory on the part of the plaintiff, he answers as follows: —

Nothing

use to the plaintiff? If aye, state the same fully, minutely, and at large, as if you had been particularly interrogated in relation thereto.

JAMES PARSONS
attorney for plaintiff.

The plaintiff names as Commissioner on their behalf, M. Eusebe Bonny, Notary Public, No. 44 Exchange Place, New Orleans.

CROSS-INTERROGATORIES

EMELIE MOULOR *vs.* AMERICAN LIFE INSURANCE COMPANY	*U. S. C. C.* *April Sess., 1873* *No. 19*

Interrogatories to be exhibited by way of cross-examination to and answered by witnesses to be produced, sworn or affirmed, and examined on the part of the plaintiff by the above named Commissioner:—

First Cross-Interrogatory:—

Have you any interest of any kind in the suit? or contingent upon the result of it?

Second

Nothing further than what I have before stated.

CROSS-EXAMINATION: —

1.- To the First Cross-Interrogatory on the part of the defendant, he answers as follows: —
None whatever, neither directly or indirectly.

2.- To

Second Cross-Interrogatory: —

Were you connected by birth or marriage, or in any way, with the deceased, or are you with the plaintiff?

Third Cross-Interrogatory: —

Were you a member of his family, and did you become acquainted with his domestic and social life? Was it by personal interview or correspondence? If the latter, annex the same to your answer.

Fourth Cross-Interrogatory: —

What was his business when first established? What was the amount of his capital? Who were his clerks? Furnish a copy of his profit and loss account from the time he first went into business nutil his death.

Fifth Cross-Interrogatory: —

Were you present at his death? How did it occur? Had you attended bim before his death? How long and for what disease? When did you first visit him, and for what cause?

Sixth

2.- To the Second Cross-Interrogatory on the part of the defendant, he answers as follows: —

Neither with the plaintiff nor with the deceased in any manner, or to any degree whatever.

3.- To the Third Cross-Interrogatory on the part of the defendant, he answers as follows: —

I was acquainted with him since the year 1855 as his physician. I was acquainted with his wife, her mother and her father as their family physician since 1855 — besides visits as a physician, I made several calls, but was not a member of the family.

4.- To the Fourth Cross-Interrogatory on the part of the defendant, he answers as follows: —

As I have stated before, when I first knew him he was in the leather business, then went into the tobacco business conveniently with the other, then purchased a sugar plantation which he sold shortly before his death, and at his death was solely engaged in the tobacco business. In the leather business he had as clerks Claudel, Denmestre and some others. In the tobacco business he had Desca and some others. I cannot state the amount of his capital, although at one time it was reputed to be over a hundred thousand dollars. I have no means of furnishing the copy demanded in this Interrogatory.

5.- To the Fifth Cross-Interrogatory on the part of the defendant, he answers as follows: —

I was not present at the moment of his death but saw his body two hours afterwards; it occurred as the result of two pistol shot wounds as I have described before. I had attended

Sixth Cross-Interrogatory: —

If, in answering the plaintiff's Thirteenth (13th) Interrogatory in chief, you say that the plaintiff was not able to distinguish right and wrong, or to appreciate the nature and quality of the act he was doing, please state minutely and particularly the grounds of your opinion, and the particular symptoms of the disease?

The defendants name as their Commissioner the firm of Race Foster and E. T. Merrick, attorneys at law, corner of Camp Street and Commercial Place, New Orleans, La.

HAZLEHURST
for defendant

tended him as his physician since 1855, for chronic asthma manifestations of the first stage of consumption; this was in 1858 and 1859; afterwards for slight indispositions from time to time, besides the asthma to which he was constitutionally subject. I also treated him for scrofula all the time. The last disease for which I was called previous to his death was on the occasion of the pains in the head, which he suffered in the night from December 31st, 1872, to January 1st, 1873. My first visit to him as a physician was in 1855 for asthma.

6.- To the Sixth Cross-Interrogatory on the part of the defendant, he answers as follows: —

The symptoms were those that I have mentioned before, depression of spirits, aberration of the mind, his inability to finish sentences after having begun them, and forgetting what the subject of his ideas had just been. When he would realize this incapacity of keeping his mind under the control of his will he would at times nervously strike his head with his fist; would at times suddenly start from a sitting position and walk about. His memory, although perfect theretofore, was much impaired and would often betray him in spite of his most energetic efforts. He would also at times become interrupted in his speech and seem lost in some unexpressed ideas. He had a wandering look about the eyes, and would pause in that way at times for ten or fifteen minutes.

JULES A. MATHIEU, M. D.

P. Chs. Cuvellier, *for plff.*
W. H. Foster,
of Race Foster, & E. T. Merrick, *for deft* } *Commissioner*

STATE OF LOUISINA,
PARISH OF ORLEANS,
City of New Orleans

We, P. Charles Curvellier and William H. Foster (of the firm of Race Foster & E. T. Merrick), at the city of New Orleans, in the Parish of Orleans and State of Louisiana, do hereby certify that the said witness, Jules A. Mathieu, prior to the taking of the said depositions on the ninth day of October, A. D. 1873, was by the above named P. Charles Cuvellier duly sworn to testify the truth, the whole truth and nothing but the truth in relation to the matter in controversy in the suit before mentioned in the caption of these depositions, and in the enclosed commission, so far as he might be interrogated in relation thereto, and the said deposition was on said ninth day of October, A. D. 1873, in the City of New Orleans in the Parish of Orleans and State of Louisiana, sworn to, taken and reduced to writing and signed by the said witness in our presence.

Given under our hands and seals in the City of New Orleans in the Parish and State aforesaid, this ninth day of October, A. D. 1873.

P. CHAS. CUVELLIER [SEAL]
Commissioner.

W. H. FOSTER [SEAL]
Counsel for defendants.

United

UNITED STATES OF AMERICA }
EASTERN DISTRICT OF PENNSYLVANIA } *sct.*

I, Samuel Bell, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the forgoing to be a true and faithful copy of the original Depositions attached to commission to New Orleans, in re Moulor vs. American Life Insurance Co., of April Sessions 1873, No. 19, in Equity, on file, and now remaining among the records of the said Court in my Office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of the said Court, at Philadelphia, this Thirty-first day of March, in the year of our Lord one thousand eight hundred [SEAL] and seventy-four and of the Independence of these United States the Ninety-eighth.

SAMUEL BELL,
Clerk of Circuit Court U. S.
E. D. of Pennsylvania.

INTERROGATORIES

AND

DEPOSITIONS

Commission of February 8th, 1876

Rule

RULE FOR COMMISSION

EMILIE MOULOR *a citizen of the State of Louisiana* *vs.* AMERICAN LIFE INSURANCE COMPANY *a corporation under the Laws of the Commonweath of Pennsylvania*	*Circuit Court of the United States for the Eastern District of Pennsylvania* *April Sess., 1873* *No. 19*

And now, to wit: January 15th, 1876, James Parsons, attorney for the plaintiff, enters a rule for a commission in the above case to take testimony at New Orleans, in the District of Louisiana, on fifteen days notice.

Commission to New Orleans

THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE THIRD CIRCUIT, OF APRIL SESSION 1873, No. 19.

EMILIE MOULOR
a citizen of the State of Louisiana

vs.

AMERICAN LIFE INSURANCE COMPANY
a corporation under the laws of the Commonwealth of Pennsylvania

THE PRESIDENT OF THE UNITED STATES

To John G. Eustis Esquire, No. 35 Carondolet Street, New Orleans, Louisiana: —

KNOW YE, That, in confidence of your prudence and integrity, we have given unto you and by these presents do give unto you John G. Eustis Esquire full power and authority in pursuance of a rule lately made in the Circuit Court of the United States in and for the Eastern District of

of Pennsylvania, in the Third Circuit, in a certain action in debt therein depending, wherein the said Emilie Moulor is plaintiff and the American Life Insurance Company a corporation under the laws of Pennsylvania is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said plaintiff, as witnesses in the said action and then and there to examine them, on their respective oath or affirmation, on certain interrogatories hereunto annexed touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said Circuit Court, closed up and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States,
[SEAL] at Philadelphia, this eighth day of February A. D. 1873, and in the 100th year of the independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court.

INTERROGATORIES

Interrogatories to be exhibited to witness to be produced, sworn or affirmed, and examined, on the part of the plaintiff in the above case, before Commissioners to be named in a commission to be issued out of the said Court to New Orleans, in the District of Louisiana: —

First: —

What is your age, residence and occupation, and how long have you had your present residence, and how long have you pursued your present occupation?

Second: —

Were you acquainted with the late Louis Moulor, the husband of Emilie Moulor, the plaintiff in this action? If so, how long have you been acquainted with him?

Third: —

DEPOSITIONS

Deposition of witness produced, sworn and examined on the Twenty-third day of February in the year of our Lord 1876, at the office of John G. Eustis No. 35 Carondelet Street in the City of New Orleans within the Parish of New Orleans and State of Louisiana by virtue of a commission issuing from the Circuit Court of the United States for the Eastern District of Pennsylvania to him directed for the examination of a witness in a certain cause depending in said Court, wherein Emilie Moulor is Plaintiff, and The American Life Insurance Company is Defendant.

JULIUS A. MATHIEU, of the City of New Orleans aged 51 years, or thereabouts, being produced, sworn and examined on behalf of the plaintiff deposeth as follows, in answer to the several interrogatories on the part of the plaintiff: —

1.- To the First Interrogatory he saith: —
I am 51 years of age, reside in New Orleans, my profession is that of a physician. I have resided in this City for the past 39 years, and have practiced my present profession for the past 21 years.

2.- To the Second Interrogatory he saith: —
I knew him, and have known him since 1854.

3.- To

Third: —

If he killed himself, state if you know the immediate cause of his death and the immediate circumstances attending it?

If you were the family physician of the said Louis Moulor?

Fourth: —

Explain in detail the nature and extent of any disease which did, or might have affected or impaired, according to your jungment, his general or permanent health?

Fifth: —

If you have referred to any disease which affected the said Moulor, in general terms, be explicit and define with accuracy the character and modifications of them in the particular instances of the subject, Louis Moulor?

Sixth: —

Do you know anything which may be material or of use to the plaintiff? If aye, state the same fully, miutely and at large, as if you had been particularly interrogated in relation thereto.

James

3.- To the Third Interrogatory he saith: —

He committed suicide, as was established by the coroner's inquest. I only saw his dead body when it was brought back to his residence. I was his family physician, and had been since 1855.

4.- To the Fourth Interrrogatory he saith: —

As to his general constitution, I will state that he was delicate. I treated him for scrofula, for the first symptoms of consumption, and for asthma; but he never learned from me, nor from any other physician in this City, nor did he suspicion or have the remotest idea, that he was affected with any such diseases himself; on the contrary, he always boasted himself as being a strong, healty and robust man.

5.- To the Fifth Interrogatory he saith: —

The asthma he had was the dry nervous asthma; no expectoration whatever, and nothing connected therewith to make the patient believe he did have it. As to the first stage of consumption, there was no softening of the tubercules and therefore no expectoration of tuberculous matter. As to the scrofula, I will state that his was very mild diathesis.

6.- To the Sixth Interrogatory he saith: —

I did not impart to said Moulor a knowledge that he was affected with any of said three before mentioned diseases, out of a feeling of humanity, a rule I never deviate from in my practice whenever the mind of the patient might be affected thereby. The Company, defendant, was aware at the time they accepted Mr. Moulor that I was his family physician, and his, and had I been applied to for information as to his general health and constitution, or requested to fill out

one

JAMES PARSONS

January 15th, 1876. *Attorney for plaintiff.*

The Plaintiff names as Commissioner on her behalf, John G. Eustis, Esquire, Attorney at law, No. 35 Carondolet Street, New Orleans Louisiana.

one of the usual blanks of examination by a physician I certainly would have stated and made known that he had been affected with the diseases I have before mentioned. I have never been absent from nor ceased practicing my profession in this City since 1854. My name was furnished Company defendant by Mr Moulor in writing, as his physician, thus enabling the Company to get all desirable information from the proper source, which information thought proper neglecting to procure. I never knew he was insured until after his death.

JULES A. MATHIEU M. D.

Sworn to and subscribed before me, this 23rd day of February, A. D. 1876.

[SEAL] J. G. EUSTIS
U. S. Commissioner Dist. of Louisiana

STATE OF LOUISIANA,
PARISH OF ORLEANS,
City of New Orleans } ss.

I, John G. Eustis, at the City of New Orleans, Parish of Orleans, and State of Louisiana, do hereby certify that the said witness, Julius A. Mathieu, prior to the taking of said deposition on the twenty-third day of February A. D. 1876, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in relation to the matter in controversy in the suit before mentioned in the caption of these depositions, and in the inclosed commission, so far as he might be interrogated in relation thereto, and the said deposition was on the twenty-third day of February A. D. 1876, in the City of New Orleans and Parish of Orleans in the State of Louisiana, sworn to, taken and reduced to writing by my clerk and signed by said witness in my presence.

I further testify that I am not, nor is my said clerk, of counsel, kin nor attorney to either party to this suit, nor interested in the event thereof.

Given under my hand and official seal at said City of New Orleans this twenty-third day of February A. D. 1876.

J. G. EUSTIS

[SEAL] *United States Commissioner District of Louisiana*

Commissioners charges, postage &c. $5.25, paid by plaintiff.

J. G. EUSTIS

[SEAL] *Commissioner &c.*

Deposition on the part of the pl'ff opened in open court and filed Mch 3 1876.

SAMUEL BELL

Clerk

1879

A 11-711

Field J.

Exhibit a

Jun. 12. 1880

SUPREME COURT OF THE UNITED STATES.

No. 10 058

THE DENVER AND RIO GRANDE RAILWAY CO.,

vs.

THE CAÑON CITY AND SAN JUAN RAILWAY CO.

Transcript of Proceedings after Mandate from Supreme Court.

DAILY GAZETTE PUBLISHING COMPANY, TEJON STREET, COLORADO SPRINGS, COLO.

To the Honorable, the Supreme Court of the United States:

Your petitioner, the Denver and Rio Grande Railway Company, a corporation organized and existing under the laws of the late Territory, and now State, of Colorado, respectfully represents:

That on or about the 13th day of May last past, your petitioner caused to be filed in the Circuit Court of the United States for the District of Colorado, a copy of the opinion lately rendered and given by this Honorable Court at the last term thereof in the certain cause wherein your petitioner was appellant, and the Cañon City and San Juan Railway Company was appellee, duly certified by the Clerk of this Court, under the seal thereof.

And on the same day and year aforesaid, your petitioner filed in the same Circuit Court the mandate of this Honorable Court, lately and on or about the 6th day of May, A. D., 1879, issued out of this Court in your petitioners's appeal aforesaid, and wherein and whereby the aforesaid cause in which your petitioner's said appeal was prosecuted, was remanded into the said Circuit Court for further proceedings to be had therein in conformity with the opinion aforesaid of this Honorable Court.

That on the 13th day of May last past your petitioner, by its solicitor, appeared in the said Circuit Court, and moved the said Circuit Court to grant to your petitioner a decree in the said cause in pursuance of the mandate of this Honorable Court; but the said Circuit Court did not nor would allow the motion aforesaid of your petitioner, but afterward, by its certain order made and entered of record in the cause aforesaid on or about the 15th day of

No 10 orgl

To the Honorable, the Supreme Court of the United States:

Your petitioner, the Denver and Rio Grande Railway Company, a corporation organized and existing under the laws of the late Territory, and now State, of Colorado, respectfully represents:

That on or about the 13th day of May last past, your petitioner caused to be filed in the Circuit Court of the United States for the District of Colorado, a copy of the opinion lately rendered and given by this Honorable Court at the last term thereof in the certain cause wherein your petitioner was appellant, and the Cañon City and San Juan Railway Company was appellee, duly certified by the Clerk of this Court, under the seal thereof.

And on the same day and year aforesaid, your petitioner filed in the same Circuit Court the mandate of this Honorable Court, lately and on or about the 6th day of May, A. D., 1879, issued out of this Court in your petitioners's appeal aforesaid, and wherein and whereby the aforesaid cause in which your petitioner's said appeal was prosecuted, was remanded into the said Circuit Court for further proceedings to be had therein in conformity with the opinion aforesaid of this Honorable Court.

That on the 13th day of May last past your petitioner, by its solicitor, appeared in the said Circuit Court, and moved the said Circuit Court to grant to your petitioner a decree in the said cause in pursuance of the mandate of this Honorable Court; but the said Circuit Court did not nor would allow the motion aforesaid of your petitioner, but afterward, by its certain order made and entered of record in the cause aforesaid on or about the 15th day of

May, A. D., 1879, the said Circuit Court granted to a certain other corporation, called the Pueblo and Arkansas Valley Railroad Company, claiming to be successor of the said Cañon City and San Juan Railway Company, plaintiff in that said suit, permission to file in the cause aforesaid its certain supplemental bill of complaint therein:

That afterwards and on or about the 22nd day of July, A. D., 1879, the said Pueblo and Arkansas Valley Railroad Company, by leave of the said Circuit Court, filed therein its certain petition, praying leave to incorporate certain matters and things therein stated in the said supplemental bill theretofore by it filed in the said cause:

That on the 27th day of June, A. D., 1879, your petitioner interposed its certain demurrer to the last mentioned supplemental bill of the said Pueblo and Arkansas Valley Railroad Company:

That afterwards, and on the 3rd day of July, A. D., 1879, at that same term of the said Circuit Court, the demurrer aforesaid of your petitioner to the last mentioned supplemental bill of the said Pueblo and Arkansas Valley Railroad Company, was, by the said Circuit Court, denied, and your petitioner was required to answer thereunto:

That on or about the 7th day of July aforesaid, your petitioner by its solicitor, exhibited its petition in the said Circuit Court, praying the said Court to enter its decree in the cause aforesaid, declaring, first—that the injunction granted in said cause against your petitioner, on the 24th day of August then last past, should be and was thereby dissolved and held for naught: second—that your petitioner hath the prior right to occupy and use the Grand Cañon of the Arkansas River in the bill in that cause mentioned, for the purpose of constructing its railroad therein, and that the said Cañon City and San Juan Railway Company, its officers, agents, servants and employès be forever enjoined from interfering with or obstructing your petitioner in its occupancy and use, or the construction of its railroad in

and through the said cañon, and that the said Cañon City and San Juan Railway Company should, on or before a day to be limited in that same month of July, apply and in proper form state and show to the said Court,

1st. Whether it pretended and claimed that it was impracticable or impossible to construct two railroads through said cañon; and, if so, then whether, since the said final decree therein on the 24th day of August, A. D., 1878, and prior to the date of the decree of this Court as aforesaid on the 21st day of April last past, it had constructed as and for its railroad any road-bed and track, or any or either thereof, in the said Grand Cañon, or in any portion thereof which admits of only one road-bed and track for railroad purposes; and if such claims should be made, that then the said Cañon City and San Juan Railway Company should specify in what part of the said cañon said road-bed and track or either thereof was located, fixing the termini and length as near as might be of said road-bed and track.

2nd. When the same was constructed, and by whom, or what party; how much, if any, thereof was constructed before the 24th day of August then last, and how much thereof subsequent to that date and before the 21st day of April last, and how much thereof since the date last named, and the actual cost of the work, during the respective times and periods above mentioned.

3d. Whether it was the intention of the Cañon City and San Juan Company to construct and operate a railroad through said Grand Cañon.

4th. Whether said Cañon City and San Juan Company would prefer to accept from the Denver and Rio Grande Company, the value or cost of the work in the portion or portions of said cañon which admit of only one road-bed and track for railroad purposes, or to occupy the same in common with the Denver and Rio Grande Company upon such terms and regulations as might be agreed upon or as the Court should prescribe; and that upon the coming in

of the claim of said Cañon City and San Juan Company, if one should be made pursuant to that order, the same should be open to traverse by your now petitioner, and that said Circuit Court do reserve to itself to make such further order in reference thereto as the justice and equity of the case might seem to require:

That afterwards, and on the 14th day of July last past, the said Circuit Conrt entered its certain decree, directing that the decree theretofore given and allowed in the said cause should be vacated and set aside; and that your petitioner should recover of and from the plaintiff its costs to the date of filing said mandate, and declaring that the right of your petitioner to first locate and construct its railway upon the way mentioned and described in the bill of complaint in that suit as against the said Cañon City and San Juan Railway and the said Pueblo and Arkansas Valley Railroad Company, as of the date of the commencement of that suit and the date of the said decree, was recognized and established:

But the said Circuit Court in that same decree, for reasons therein set forth, declared that no further deeree, touching the ultimate right of the parties, could be given or allowed until the Court should be better advised in the matters therein aforesaid; and thereupon by that same decree the said Circuit Court, among other things, restrained your petitioner from doing any act or thing towards building or completing the said line of railway until the further order of the Court, and from interfering with, but confirming the then possession of the other party in the said line of railway, and directing that three engineers should be appointed to report to the Court, touching the certain matters in its said decree set forth.

That afterwards, and on the 24th day of July aforesaid, your petitioner, by its solicitors, suggested to the said Circuit Court, that the decree aforesaid on the 14th day of July then instant, entered in that cause, was not a full and

complete decree, and that your petitioner was not thereby awarded the relief whereunto, by the mandate and opinion of the Supreme Court lately filed in that cause, your petitioner was entitled, and prayed the Court to give further decree therein, and to award the decree prayed and sought by your now petitioner in its petition filed in that said Circuit Court on the 7th day of July aforesaid, or such other and different relief as your petitioner was entitled, under said mandate, to have.

But the said Circuit Court, by its order on that same day made and entered of record in that cause, declared, that for the reasons set down in the decree aforesaid entered therein, said petition should be denied, and that further and final decree in said cause be deferred until the other controversies then pending between the parties in that cause as set forth in the former decree of the Court therein, should have been determined: all which will appear by a certain transcript of the record of proceedings aforesaid had in the said Circuit Court, hereunto attached, marked Exhibit "A," and prayed by your petitioner to be taken as a part hereof.

Wherefore your petitioner prays that the Honorable, the Judges of the said Circuit Court, by some short day to be limited by this Honorable Court, show cause why a writ of *mandamus*, according to the course and practice of this Court, should not be issued out of this Court under the seal thereof, commanding them to proceed and give final decree in the cause aforesaid of the Cañon City and San Juan Railway Company against the Denver and Rio Grande Railway Company whereby petitioner shall be restored to the possession of the premises in question; that the injunction entered in that cause against your petitioner on the 24th day of August, A. D., 1878, be and is dissolved and held for naught; and upon the pleadings in said cause that your petitioner hath the prior right to occupy and use the Grand Cañon of the Arkansas River in its cross-bill in that cause mentioned, for the purpose of constructing its

railroad therein; and that the said Cañon City and San Juan Railway Company, its officers, agents, servants and employès shall forever refrain from interfering with or obstructing your petitioner in such occupancy and use of said cañon, or in the construction of its railroad in and through the same; and inasmuch as the said Cañon City and San Juan Railway hath contumaciously refused to avail of the relief proffered by the said mandate, and by the device o the so-called supplemental bill and other proceedings, hath succeeded in keeping your petitioner out of the possession of its property for many months to petitioner's great damage; that the foregoing relief be without condition; but if this Honorable Court shall deem this inequitable, then directing that the said Cañon City and San Juan Railway Company shall within some short day to be by said Circuit Court limited, amply and in due form, state and show to the said Circuit Court, whether it pretends or claims that it is impracticable or impossible to construct two railroads through said Grand Cañon, and, if so, then whether since the final decree in that cause on the 24th day of August, A. D., 1878, and prior to the decree given in this Honorable Court on the 21st day of April, A. D., 1879, it has constructed as and for its railroad any road-bed and track or any or either thereof in the said Grand Cañon or in any portion thereof which admits of only one road-bed and track for railroad purposes; and that if such claim be made, then that the said Cañon City and San Juan Railway Company specify and show:

1st. In what part or portion of the cañon said road-bed and track, or either thereof, is located, fixing the termini and length as near as may be of the said road-bed and track.

2nd. When the same was constructed, by whom, or what party; and how much, if any, thereof was constructed before the 24th day of August, A. D., 1878, and how much subsequent to said date and before the 21st day of April,

A. D., 1879, and how much thereof since the date last named; and the actual cost of the work during the respective times and periods above mentioned.

3d. Whether it is the intention of the said Cañon City and San Juan Railway Company to construct and operate a railroad through said Grand Cañon.

4th. Whether the said Cañon City and San Juan Railway Company prefer to accept from your petitioner the value or cost of the work in the portion or portions of said cañon, which admit of only one road-bed or track for railroad purposes, or to occupy the same in common with your petitioner upon such terms and under such regulations as may be agreed upon, or as the Court shall prescribe:

That upon the incoming of such claim of said Cañon City and San Juan Railway Company, if one shall be made, the same be open to traverse by your petitioner; and that the said Circuit Court doth reserve to itself to make such further order in reference thereto, as the equity and justice of the case may seem to require; or that the said Justices show cause to the contrary before this Honorable Court by some day to be therein limited; or that your petitioner may have such alternative writ of *mandamus* with such other and different order and direction therein, as to this Honorable Court shall seem meet.

The Denver & Rio Grande
R. W. Co.
by Wm J. Palmer
Pres't

Seal

Wells Smith & Macon

P. Usher. Jas: Grant

Symank. Bass. A. A. Risley

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO, } ss.

William J. Palmer being first duly sworn saith on oath: that he hath read the foregoing petition by this deponent, as President of the Denver and Rio Grande Railway Company, subscribed, and knows the contents thereof: and the same is true of deponent's own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true, and deponent hath caused said petition to be attested by the seal of said Company — Wm J. Palmer

Subscribed and sworn to before the undersigned, Clerk of the Circuit Court of the United States for the District of Colorado, at the city of Denver, this 1st day of October, A. D., 1879.

WITNESS my hand and the seal of said Court.

Edward F. Bishop
Clerk Circuit Court, U. S.,
Dist. of Colorado.

Seal

To the Honorable Samuel F. Miller and the Honorable Moses Hallett, Judges of the Circuit Court of the United States, for the District of Colorado, and to the Canon City and San Juan Railway Company, the Pueblo & Arkansas Valley Railroad Company, and Messrs. H. M. & W. Teller, G. B. Reed and and Charles E. Gast, Esqs., their solicitors:

Please take notice that on the 20th day of October, A. D. 1879, we will apply to the Supreme Court of the United States to grant the prayer of a certain petition, with a copy whereof you are now herewith served.

Very respectfully,

Your obedient servants,

Wells Smith & Macon

J. P. Usher

Jas: Grant

Lyman K. Bass

H. A. Risley

Solrs for Petitioner

SUPREME COURT OF THE UNITED STATES.

No. 10.—ORIGINAL.

1 UNITED STATES OF AMERICA,
District of Colorado, ss:

E. T. Wells, being first duly sworn, saith on oath, that on the 1st day of October, A. D. 1879, he delivered a copy of the foregoing notice, petition, and the exhibit thereunto, here following, unto the honorable Moses Hallett, district judge of the United States for the district of Colorado, and a like copy of said notice, petition, and exhibit unto Willard Teller, esq., one of the attorneys for the Cañon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company in said petition mentioned, and further saith not.

E. T. WELLS.

Subscribed and sworn to before the undersigned, clerk of the circuit court of the United States for the district of Colorado, at the city of Denver, this 4th day of October, A. D. 1879.

Witness my hand and the seal of said court.

[SEAL.] EDW'D F. BISHOP,
Clerk Circuit Court U. S., District of Colorado.

2 This is to certify that I have examined the exemplification which follows, and believe the same to truly set forth the proceedings had in the within-mentioned cause at the May term, A. D. 1879, of the circuit court for the district of Colorado, and I consent that if the court shall deem the petitioner entitled to the mandamus prayed, the peremptory writ may go in the first instance, this being treated as the return of the court, so far as I am concerned.

Denver, Oct. 13, 1879.

MOSES HALLETT,
Dist. Judge.

I concur in the foregoing.

SAM. F. MILLER.

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SUPREME COURT

OF THE UNITED STATES.

No......

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

vs.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

Transcript of Proceedings after Mandate of Supreme Court.

PLEAS

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF COLORADO.

BE IT REMEMBERED, That heretofore, and on to wit the 13th day of May, A. D. 1879, there was filed in said Court and in a certain cause in said Court then pending wherein The Cañon City and San Juan Railway Company was complainant, and the Denver and Rio Grande Railway Company was defendant, the opinion of the Judges and the Mandate of the Supreme Court therein, and the said opinion is in words and figures as follows, to wit:— FOLIO 2

OPINION.

SUPREME COURT OF THE UNITED STATES.

NOS. 811 and 812.—OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY CO., *Appellant,*
811 vs.
E. T. ALLING, ETC.

SAME, *Appellant,*
812 vs.
THE CAÑON CITY AND SAN JUAN RAILWAY CO.

Appeals from the Circuit Court of the United States for the District of Colorado.

Mr. Justice HARLAN delivered the opinion of the Court.

STATEMENT.

These causes involve the conflicting claims of two railroad corporations—the Denver and Rio Grande Railway
3 Company and the Cañon City and San Juan Railway Company—to the occupancy and use of the Grand or Big Cañon of the Arkansas for railroad purposes. For the sake of brevity the former will be hereafter designated as the Denver Company, and the latter as the Cañon City Company.

The Denver Company became incorporated in the year 1870, in conformity to the laws of the then Territory of Colorado. Its object, expressed in articles of incorporation filed in the proper office of the territory, was to locate, construct,
4 operate, and maintain certain railway and telegraph lines, viz., the Denver and Rio Grande railway, the Denver and Southern railway, the South Park railway, the Western Colorado railway, the Moreno Valley railway, the San Juan railway, the Gallisteo railway, and the Santa Rita railway. The general route of each line was designated in the articles of incorporation. That of the main line—the Denver and Rio Grande railway—was as follows: "Commencing at Denver, Colorado Territory,

thence running up the valley of the South Platte river, on the southeast side thereof, to a point at or near the mouth of Plum creek; thence up the valley of Plum creek, to a point at or 5
near the forks of East Plum creek and West Plum creek; thence up the main east branch of Plum creek valley to the lake in township 11 range 67 west, on the east side of the ridge dividing the waters of Plum creek and Monument creek; thence down the valley of Monument creek to a point at or near the junction of the valleys of the Monument and Fontaine qui Bouille, or to a point in the Fountain valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley 6
of the Fountain or across its west tributaries to such a point on the Arkansas river at or above Pueblo as may be found upon a detailed survey to be the most eligible for intersecting the same: *thence up the valley of the Arkansas to a point at or near Canon City*; *thence continuing up the valley of the Arkansas through the Big Canon of the same to a point at or near the mouth of the Arkansas river*; thence by the valleys or the adjoining slopes of the Arkansas river and of Pueblo creek to 7
the summit of the divide between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande Del Norte; thence in a general southerly direction, by the particular route which may be determined upon by a detailed survey to be the most eligible, down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be 8
found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico." The remaining seven roads are, and were intended to be, branches or feeders of the main line.

OPINION.

SUPREME COURT OF THE UNITED STATES.

Nos. 811 and 812.—OCTOBER TERM, 1878.

THE DENVER AND RIO GRANDE RAILWAY CO., *Appellant,*
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E. T. ALLING, ETC.

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STATEMENT.

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the summit of the divide between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande Del Norte; thence in a general southerly direction, by the particular route which may be determined upon by a detailed survey to be the most eligible, down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be 8
found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico." The remaining seven roads are, and were intended to be, branches or feeders of the main line.

FOLIO

By an act of Congress, approved June 8, 1872, "the right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other build-
9 ings for railroad purposes, and for yard room and side tracks, not exceeding 20 acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line," was granted and confirmed unto the Denver Company, its successors and assigns. It is described in the act as a corporation created under the incorporation laws of the Territory of Colorado. By the act, all
10 the rights, powers, and franchises conferred by these laws on corporations created thereunder for constructing and operating railroad and telegraph lines were granted, ratified, and confirmed to that company for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the conditions and requirements of the territorial statutes so far as the same were applicable and not inconsistent with the laws of the United States. The act also gave to the company the rights, powers, and privileges conferred upon the Union Pacific Railroad Company by section 3
11 of the act of July 2, 1864. But the rights thus granted and conferred were accompanied by the proviso that the company should complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years after the passage of the act of Congress, and complete each year thereafter fifty miles additional south of that point.—(17 Stat., 339.)

By an act of Congress, approved March 3, 1875, the act of June 8, 1872, was corrected by adding thereto a proviso,
12 which was declared to have been omitted by mistake of the copyist from the last named act. That proviso declares, among other things, that the "Denver and Rio Grande Railway Com-

pany is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges, and franchises by said laws conferred upon said company are hereby expressly ratified, confirmed, and legalized as existing from the said date of incorporation." (18 Stat., 576.)

On the same day, March 3, 1875, Congress passed an act granting a "right of way through the public lands of the United States," to *any* railroad "company duly organized under the laws of any state or territory, except the District of Columbia, or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of the road, material, &c., necessary for the construction of the road, and grounds, station building, depots, machine-shops, side-tracks, turnouts, and water stations, &c." 13 14

The 2d section of that act provides:

"That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any *canon*, *pass*, or *defile*, shall not prevent any other railroad company from the use and occupancy of said canon, pass, or defile, for the purposes of its road, *in common with the road first located*, or the crossing of other railroads at grade. And the location of such right of way through any canon, pass or defile, shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable 15

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location, and in as perfect a manner as the original road:
16 *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canon, pass, or defile."

Section 4 declares that any railroad company desiring to secure the benefits of that act shall, "within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon the approval thereof by the Secretary of the Interior,
17 the same was required to be noted upon the plats in said office, and thereafter all such lands over which such right of way passes should be disposed of subject to such right of way"—all rights thereby granted to be forfeited as to any section located but uncompleted within five years after such location. —(18 Stat., 482.)

On 15 February, 1877, Alling, Locke, and Megrue became incorporated under the laws of Colorado, as "The Canon City and San Juan Railway Company," with a capital stock
18 of $100,000, for the purpose of constructing and maintaining a railroad from Canon City, thence up the valley of the Arkansas river through the Grand Canon thereof, thence by the most practicable route, following that river to South Arkansas post office in Lake county, Colorado. The articles of incorporation were filed in the office of the Secretary of State of Colorado, on 19 February, 1877. On the 22 June, 1877, the Secretary of the Interior, in an official communication, declared his approval of the proofs of organization filed by the Canon City Company,
19 and of the map showing the line of its road for a distance of 20 miles.

On the 3d of March, 1877, Congress passed an act amending that of June 8, 187 , so as to read that the Denver Company should have *ten* years from the passage of the original

act, to complete its railway as far south as Santa Fe, in default of which the rights and privileges granted to it should be null and void as to the unfinished part of said road.

And on 20 April, 1878, the Canon City Company filed its complaint for injunction and relief against the Denver Company in the Third Judicial District Court of Colorado, 20
Fremont county, claiming that it had complied, in all respects, with the act of Congress of March 3, 1875, and had acquired a prior right to construct its road through the Grand Canon, one hundred feet on each side of its line as surveyed in 1877. It charged that the defendant was interfering with the construction of its road upon that line.

In accordance with the prayer of the bill an injunction was granted by the state court restraining the defendant from interfering with its further operations in the canon. On 22 April, 1878, that action upon the petition of defendant com- 21
pany, was removed for trial into the Circuit Court of the United States for the District of Colorado.

On 27th April, 1878, the Denver Company filed its bill in the Circuit Court of the United States for the District of Colorado, against Alling and others, who are designated in the charter of the Canon City Company as its trustees for the first year, and against the Atchison, Topeka and Santa Fe Railway Company, charging that the Canon City Company was not a legally constituted corporation; that the individual defendants, wrongfully claiming to be such corporation, had, by force, 22
occupied the Grand Canon, and were proceeding to locate their road upon a line in that canon which plaintiff had surveyed in 1871-72, and upon which plaintiff had made preparations to resume active work on the 19th April, 1878; that, although plaintiff was in the occupancy of the narrow portion of the canon, where only one road could be located, the defendants threatened by force to drive away its engineers and servants then working in said canon, and thereby dispossess plaintiff of its located line and grade in the narrow part of said

FOLIO

23 canon; that the defendants were aided and abetted in said course by the Atchison, Topeka and Santa Fe Railway Company, who sought to build a road from Pueblo, by the valley of the Arkansas, and through said canon, and to that end had confederated with the defendants to compel plaintiff to abandon the extension of its railway as authorized by its charter and the act of Congress. The plaintiff, by its bill, claimed an exclusive right of way through the Big Canon, upon the line of its survey, and one hundred feet upon each side
24 of its road, and to that effect relief was asked by final decree. In that suit a temporary injunction was granted against the Canon City Company, restraining it from occupying or attempting to occupy the Big Canon, and from, in any way or manner, constructing or attempting to survey, locate, or construct their line of railroad through the canon, which, for the purposes of that suit was taken and decreed to begin at what is known as the "Point of Rocks," at the mouth of the canon, and extending to the twelve mile bridge. That injunction was subsequently modified and limited in its operation to that part of
25 the canon known as the Royal Gorge, and the defendant was allowed to enter upon that part of the canon and grade the same for a railroad, but not to lay ties or rails on any part thereof until the future order of the court.

In the action instituted by the Canon City Company, the Denver Company filed a cross bill, setting out substantially the same facts as in its original bill against Ailing and others.

Upon final hearing a decree was rendered in the suit of the Canon City Company against the Denver Company which, among other things, recognized the prior right of the former to
26 proceed in the construction and operation of its road through the Grand Canon, without interference or obstruction, in any way, by the latter company, but with liberty to the Denver Company to exhibit its bill in any court of competent jurisdiction to compel the Canon City Company to so change,

locate and construct its road as to permit the convenient and proper location by the Denver Company of its own road, or to compel the Canon City Company to permit the Denver Company to occupy the track and roadway of the former company, if at any point in that defile it should be impracticable to con- 27
veniently lay down or safely operate two distinct lines of railway. From that decree the Denver Company appealed, and it also appealed from the decree in its own suit whereby the preliminary injunction granted to it was dissolved and its bill dismissed.

OPINION.

A preliminary question, presented for our consideration, must be first disposed of.

These causes were determined in the circuit court, by final decree, on the 24th August, 1878. Upon stipulation between the parties they were submitted here on the 10th of January last. On the 20th January it was represented to this court, in proper form, that the Pueblo and Arkansas Valley 28
Railroad Company owned a railroad which, with its branches and extensions, is a continuation in the State of Colorado, of the line of the Atchison, Topeka and Santa Fe Railroad Co. in the State of Kansas; that since the pendency in this court of these causes certain contracts and arrangements had been made and executed between the Denver Company, the Atchison, Topeka and Santa Fe Railroad Company, and the Pueblo and Arkansas Valley Railroad Company, with the consent of the appellees in both suits; that they were made after the filing of the stipulation for the argument of these causes, and com- 29
pleted, and in part executed, after the filing of the printed arguments herein; that by said contracts and arrangements the Atchison, Topeka and Santa Fe Railroad Company had taken a lease of all the constructed lines of the Denver Company for 30 years from December 1, 1878, had received and was then in the possession of and operating said lines, had pur-

FOLIO

chased and received all the railroad supplies and materials of that company and had purchased and had transferred to a trustee for its use a majority of all the shares of its capital stock, with
30 an agreement providing for a further purchase and ownership of the remainder of such stock, and with the further agreement that the Pueblo and Arkansas Valley Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company should have the selection of a majority of the directors of the Denver Company, the other third being selected by the bondholders of the latter company; that those contracts and agreements were made with the intent and design of ending all controversies, and especially all competitive construction of railroad lines between the Denver Company on the one part, and the Atchison, Topeka and Santa Fe Rail-
31 road Company and the roads operated by it, including the Pueblo and Arkansas Valley Railroad Company, on the other part; that, by reason of the premises, the Atchison, Topeka and Santa Fe Railroad Company, in its own right, and in connection with the Pueblo and Arkansas Valley Railroad Company, had become and was equitably the owner and entitled to the control of all the affairs, suits, interests, and property of the Denver Company, and especially to the discontinuance of all litigation hostile to the interests of the Atchison, Topeka and Santa Fe Railroad Company and the Pueblo and Arkansas Valley Railroad Company. Upon these grounds the
32 Pueblo and Arkansas Valley Railroad Company, (the present name of the Canon City Company), and Alling and others, appellees, moved the court that the stipulation for the submission of these causes, upon printed arguments, be cancelled and discharged, such printed arguments withdrawn from the files, and the appeals dismissed. Upon the part of the Atchison, Topeka and Santa Fe Railroad Company a motion was submitted that it be allowed to intervene and take charge of these suits in the name of the Denver Company, and appear by its solicitor, on behalf of the appellants, that it may give consent

of record, to the dismissal of the appeals. The trustee referred to in the alleged contracts gave his consent to the motions, 33
and their hearing was set for the 20th March, this court, in the meantime, suspending any action upon the appeals. At that date the Denver Company appeared by its attorneys and resisted each motion.

Upon hearing of the motions it appeared, among other things, that on the 1st day of March, 1879, the Denver Company had issued 85,000 shares of stock, of which the plaintiffs in the motions claimed to own or control a bare majority—42,510 shares. It was also shown, that at a meeting of the directors of the Denver Company, held on 7th February, 1879, 34
a quorum being present, resolutions were unanimously adopted, declaring that these motions were hostile to the interests of that company; that the claims of the Atchison, Topeka and Santa Fe Railroad Company, and the Pueblo and Arkansas Valley Railroad Company were unfounded, and their assertion for the fraudulent purpose of depriving the Denver Company, its stockholders and creditors, of valuable rights, interests, and property, without compensation. The resolutions instructed the president and the attorneys of the company not only to oppose these motions, but, by all legal means, prevent the dismissal of these appeals, or the intervention herein for 35
any purpose of any company or person not a party to the record. They were also required to prosecute the appeals in this court with the utmost diligence. At the arguments of the motions, copies of all the contracts, resolutions, and writings relied upon by the respective parties were submitted for our examination. Upon careful consideration of the suggestions of learned counsel, we do not doubt that our duty is to decline any expression of opinion as to the effect or proper construction of the numerous documents which, it is claimed, give the plaintiffs in the motions the right to have the appeals of the Denver 36
Company dismissed. It is apparent that there are serious differences among the stockholders of that company, not only as

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to its general policy in the future, but as to the validity and interpretation of the contracts and writings under which the Atchison, Topeka and Santa Fe Railroad Company and the Pueblo and Arkansas Valley Railroad Company claim to be equitably the owners, and entitled to the control of the affairs, property, and suits of the Denver Company. We cannot now enter that field of controversy. The present appeals are being
37 prosecuted to final judgment by order of the directors or trustees of the appellant corporation. To them, by law, is committed the management of the property and concerns of the corporation. In all litigation involving the action of the corporation they are its representatives in court. In the discharge of their duties they represent not only the stockholders, but the bondholders and creditors of the company. Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the company, ought not to be controlled or interfered with by this court, by reason of anything which appears upon the pending motions. Upon their
38 responsibility as directors and trustees they insist that these causes shall proceed to final judgment, in accordance with the stipulation heretofore made by the parties to the appeals. If, in prosecuting them to final judgment, they violate any trust committed to their hands, or any agreement which is binding upon the corporation and the minority stockholders, remedy may be sought in some court of original jurisdiction, into which, upon proper pleadings, all persons interested may be summoned. No such proceeding has been instituted, so far as we are informed, and we do not feel at liberty, upon the sug-
39 gestion of strangers to the decrees appealed from, to go behind the official action of the board of directors or trustees, and, in plain disregard of their wishes, and their directions to counsel, dismiss the appeals and thereby refuse to consider questions regularly presented for our determination.

The motions are, therefore, denied, and we proceed to an examination of the cases upon their merits, premising that our

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present duty is limited to a determination of the rights of the parties as they existed when the final decrees were rendered, and as they are manifested in the records before us. If, since these decrees were entered, the Atchison, Topeka and Santa 40
Fe Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, have, by valid contract, acquired a controlling interest in the property, rights, and affairs of the Denver and Rio Grande Railroad Company, that interest can be asserted by appropriate proceedings, and will not be affected by anything we may determine upon the issues presented by these appeals.

The several acts of Congress upon which the Denver Company and the Canon City Company rest their respective claims to priority of right in the Big or Grand Canon have already been referred to. We have also given the history of the organization of both companies. But there are other facts 41
of an important character to which attention will be called in the course of this opinion.

The first question upon the merits, necessary to be considered is as to the proper construction of the act of June 8, 1872. In its determination, however, we should not overlook what had previously transpired in the history of the company to which was granted, by that act, a right of way over the public domain. In January and February, 1871, very shortly after its articles of incorporation were filed in the proper office of the territory, the Denver Company caused a survey to be 42
made of the route through the Grand or Big Canon of the Arkansas, for the purpose, as declared by the engineer who conducted it, of retaining control of the canon for that company. That survey, extending through the entire length of the canon, is described by him as a "close preliminary," that is, a line very near location, without an actual location of the curves. But the location of the curves, he testifies, could have been made in his office away from the canon. With that exception, he pronounces it to have been a complete 43

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survey. The line thus surveyed was marked by stakes every hundred feet, numbered consecutively, and at points where it seemed necessary, a plus or stake between the hundred feet was added. Of the work then done, a map and profile were made and returned to the chief engineer of the company, and estimates sent to its general manager. Upon the occasion of that survey, or shortly thereafter, employes of the company, under the direction of its engineer, removed several hundred yards of material, graded several hundred feet at the upper
44 outlet of the canon and put up a retaining wall ten to fifteen feet high, and about one hundred yards in length. In January, 1872, the survey was continued west of the canon for a distance of four or five miles. While these surveys were being made, the company was employed in the construction of its road from Denver to Pueblo, and completed it to the latter place within a few days after, or about the date of the passage of the act of June 8, 1872. It may also be stated, in this connection, that it completed its road from Pueblo to Labran,
45 within eight miles of Canon City, about the first of October, 1872, and to Canon City in July, 1875. All this was consistent with a purpose, upon the part of the Denver Company, to avail itself ultimately, and within the time prescribed by law, of the granted right of way through the Grand Canon.

Of what the company had done, prior to the passage of the act of 1872, towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed. It was aware, we must also presume, of the routes designated
46 in the charter of the company for the main road and its several branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed is quite clearly indicated by the terms employed in the act of 1872. That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and brances. In this view, and having due regard to all the cir-

cumstances and condition of the company, when the act was passed, we do not doubt that the intention of Congress was to 47
grant to the company a present beneficial easement in the particular way, over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress. When such location and appropriation took place the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion. —(*21 Wall., 44*; *9 Wall., 95*; *2 Otto, 741*; *Mo., Kan. & Tex. R* 48
W. Co. vs. Kansas Pac. R. W. Co., Oct. Term, 1878.)

It is here suggested by counsel for the Denver Company, that the surveys made in the Grand Canon in 1871 and 1872, constituted, without further action on its part, a sufficient location and appropriation of at least that part of the designated route. To this proposition we cannot yield our assent. The right of way through that pass was not, in itself, and separate from the right of way along the whole route, of any 49
special value, except the company surveyed its line and located its road east and west of that defile. The grant was an entirety as to the right of way over all the lands lying on the route designated in the charter of the company, and it would be unreasonable to say that, as to a particular part of that route, a mere preliminary survey was in itself equivalent to a fixed location of the road and an appropriation of the way granted, while as to another part of the general route a similar survey would not be an appropriation of the way granted, unless followed by actual occupation and use for railroad pur- 50
poses. Any such construction of the statute must be held altogether inadmissible.

When was there, then, an appropriation by the Denver Company of the Grand Canon within the principle we have stated? In 1877 and 1878 it became evident that that pass

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was of vital importance to any company desiring to reach the trade and business of the country beyond it, whether to the west, northwest, or southwest. Discoveries then recently made of mineral wealth in Western Colorado gave it immense pecuniary value in railroad circles,
51 since, as the evidence tends to establish, the occupancy of the Royal Gorge of the Grand Canon by one line of railroad would practically exclude all other competing companies from using it for like purposes, except upon such terms as the first occupant might dictate. From the date of the survey make in 1872, down to April 19, 1878, the record furnishes no evidence that the Denver Company actually occupied that defile for any purpose whatever. On that day, however, congress having extended the time to ten years from the date of the original act within which to complete its road as
52 far south as Santa Fe, that company did, by his agents, occupy the narrow portion of the canon known as the Royal Gorge, with the avowed intention of constructing its road upon the line of the surveys made in 1871 and 1872. But during the night of April 19, 1878, the board of directors of the Canon City Company were convened, and Robinson and Strong, the chief engineer and manager, respectively, of the Atchison, Topeka and Santa Fe Railroad Company, were elected to the same positions in the Canon City Company. They made
53 preparations to take immediate possession of the canon in behalf of the last named company. Evidence of their diligence and activity in that direction is found in the fact that on the morning of the 20th, as early as four o'clock, a small squad of their employes, nine or ten in number, under the charge of an assistant engineer, swam the Arkansas river, and in the name of their company took possession of the canon. Under the circumstances, it is not material that they failed to find a rival force in the canon at such an unseasonable hour. That squad was followed the same day by a large and overpowering force
54 of workmen under the control of Robinson. These movements

were succeeded by a suit instituted the same day in the state court in the name of the Canon City Company against the Denver Company, in which an injunction was obtained restraining the latter company from occupying or attempting to occupy the canon for railroad purposes, or from interfering with the Canon City Company in the construction of its own road therein.

The last named company now insists that it has the prior right to occupy and use the canon for its line of road. In support of this claim, it contends that the other company had lost 55
whatever rights it acquired in the canon through the imperfect survey of 1871 and 1872, by its long inaction after the construction of the road to Canon City, and by its failure, within a reasonable period, to follow up those surveys by actual location and occupancy for railroad purposes. The conduct of the Denver Company, it is urged, evinced a settled purpose upon its part to abandon its grant of a right of way through that canon. The answer to all this seems very obvious

As to the surveys of 1871 and 1872, although defective in 56
some particulars, and not equivalent to actual location or appropriation of the way, they were quite as complete and extended as the survey which the Canon City Company caused to be made in 1877. The evidence shows, beyond all question, that when the latter survey was made there was seen in the canon all or very many of the stakes which the engineer of the Denver Company had put there in 1871 and 1872. Those who made the survey in 1877 undoubtedly knew when, by whom, and for what purpose those stakes had been there 57
placed. Nor had they sufficient reason to suppose that the Denver Company had finally abandoned its purpose of constructing a road through the canon. We have already referred to the completion of the road from Denver to Pueblo, and from Pueblo to Canon City by July, 1875. In 1873 the Denver Company commenced the construction of one of its branches, the Denver and Southern railway. Commencing at

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Pueblo it completed that road to Cucharas, fifty miles from Pueblo, by February, 1876, to Garland, sixty miles from there,
58 by August, 1877, and to the valley of the Rio Grande by July, 1878. After July, 1875, the company, it is true, suspended active work upon the line west of Canon City. But the cause of such suspension, as its officers testify, was the widespread depression in business and financial circles, and the belief, shared by all interested in the prosperity of the company, that the extension of the line southward from Pueblo gave promise of quicker returns and more immediate results in every way. They state that it was the purpose of the company to resume
59 work upon its line through the canon as soon as the necessary means therefor could be obtained, and that there was no intention at any time to abandon the route west of Canon City. Their delay in the construction of the road west of Canon City and through the Grand Canon seems to have been in the interest of the stockholders they represented and not inconsistent with an honest purpose, within the period fixed by law, to meet the objects for which Congress granted to it the right of way. Its surveys of 1871-72, followed by an occupancy of the canon on the 19th of April, 1878, in advance of
60 the Canon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver Company then, if not before, came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872, and whatever privileges or advantages belonged to that position, it was entitled to have secured against all intruders.

But the important question remains as to the effect of the act of March 3, 1875, granting the right of way through the public lands of the United States to any railroad company
61 duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States. The explicit language of that act leaves no doubt as to its object. It declares "that any railroad company whose

right of way or whose track or road-bed upon such right of way, passes through any canon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade." At the date of that act the road of the Denver Company, as we have seen, had not 62
been located through the Grand Canon of the Arkansas. But it had a subsisting grant of a right of way through that defile. According, therefore, to the act of March 3, 1875, the Canon City Company, if it belonged to the class described in the first section of the act, might, for the purposes of its road, occupy, use and that canon in common with the Denver Company.

Upon this branch of the case the first contention of the latter company is that the Canon City Company was not "duly organized" under the laws of Colorado, and, therefore, by the 63
terms of the act of March 3, 1875, was not entitled to its benefits. But this objection is not well taken. The articles of incorporation filed by that company seem to be in substantial compliance with the statutes of Colorado. This objection need not be further considered.

But its right to claim the benefit of the act of March 3, 1877, is impeached upon the further ground that it was not organized in good faith, for the purpose of constructing a road for itself, but was the mere instrument of the Atchison, Topeka and Santa Fe Company, by whom the real work of construction through the canon was carried on. It is not to be doubted, under the evidence, that the Atchison, Topeka and Santa Fe Railroad Company is the active power behind all the movements made in the name of the Canon City Company for the occupation of the canon, and that the former company or some of its stockholders, were deeply interested in the success of the movement to drive the Denver Company from the Grand Canon. But the Canon City Company is none the less a railroad company, duly organized under the laws of 65

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Colorado. It is, therefore, embraced by the very letter of the act of March 3, 1875. We are unable to perceive upon what sound principle the court can go behind its regular and lawful organization and exclude it from the rights granted by that act, because in the prosecution of its work it derives assistance or accepts aid from another corporation, with which it may choose to share the benefits secured under the act of Congress.

Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act
66 of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Canon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired
67 on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th April, 1878, to take possession of the Grand Canon and prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the act of March 3, 1877, it must be held to have assented
68 to the provisions of the act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company duly organized under the laws of any state or territory might use and occupy the canon, for the purpose of its road, in common with the road first located. At the time of the passage of the act of March 3, 1875, Congress had become convinced of the importance to the country, and particularly to the Western States, of preserving canons, passes, and defiles in the public domain for the equal and common use of
69 all railroad companies organized under competent state or

territorial authority, and to which might be granted by national authority the right of way. We may well presume that the extension of time accorded to the Denver Company by the act of March 3, 1877, would not have been given except subject to the conditions contained in the act of March 3, 1875. This conclusion renders it unnecessary that we should, in this case, consider whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Canon within 70
five years after the passage of the act of June 8, 1872.

It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Canon. The decree, as entered, can only be sustained upon the assumption that the Canon City Company had by prior occupancy acquired a right superior to any which the Denver and Rio Grande Railway Co. had to use the canon for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by 71
the acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other company. Where the Grand Canon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road. Further, if in any portion 72
of the Grand Canon it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and

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equitable, establish and secure the right of the Canon City Co., conferred by the act of March 3, 1875, to use the same road-bed and track, after completion, in common with the Denver Company.

The decrees in these causes are, therefore, reversed, with
73 directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each suit, the court below will recognize the prior right of that company to occupy and use the Grand Canon for the purpose of constructing its road therein, and will enjoin the Canon City and San Juan Railway Company, its officers, agents, servants, and employes, from interfering or obstructing that company in such occupancy, use, and construction. It may be that, during
74 the pendency of these causes in the court below, or since the rendition of the decrees appealed from, the Canon City and San Juan Railway Company has, under the authority of the circuit court, constructed its road-bed and track in the Grand Canon, or in some portion thereof. In that event, the cost thus incurred in those portions of the canon which admit of only one road-bed and track for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

The court will make such further orders as may be necessary to give effect to this opinion. True copy, test.

75 [SEAL.] D. W. MIDDLETON,
Clerk Sup. Ct. U. S.

Mr. Chief Justice Waite dissenting:—

I dissent from the judgment in this case. In my opinion the grant of the right of way to the Denver and Rio Grande Company, contained in the act of June 8, 1872, is no more than a license to enter upon and use such of the public lands of the United States as should be unoccupied and not appro-

priated to other purposes when the permanent location of its road with a view to actual construction should be made. Words which, in a grant of land to aid in building a railroad, imply a present grant, need not necessarily have that effect in a 76
grant of right of way only.

I think, also, the Canon City and San Juan Company made the first permanent location with a view to actual construction through the pass in controversy. Consequently it secured the preference of routes, subject to a reasonable use of the route it occupied, if necessary, by the Denver Company in common with itself.

And the said Mandate is in words and figures as follows, to-wit:—

MANDATE.

"UNITED STATES OF AMERICA,—ss.

Seal of the Supreme Court of the United States.

"The President of the United States of America, To the Honorable the Judges of the Circuit Court of the United States for the District 77
of Colorado, GREETING:

"Whereas, lately in the Circuit Court of the United States for the District of Colorado, before you, or some of you, in a cause between the Canon City and San Juan Railway Company, complainant, and the Denver and Rio Grande Railway Company, defendant, (Bill and Cross-Bill), wherein the decree of the said Circuit Court entered in said cause on the 24th day of August, A. D. 1878, is in the following words, viz:

"This cause, coming on to be heard at this term of the court, upon the pleadings of the said parties, respectively, and the testimony heard before the court in the certain cause in 78

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equity at this same term of this court depending, wherein the said Denver and Rio Grande Railway Company is plaintiff, and Ebenezer T. Alling et al. are defendants, which, by agreement of counsel, was also heard and considered in this above entitled cause, and upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

That the injunction heretofore awarded against the said plaintiff herein, be, and the same is hereby dissolved, and that said plaintiff be at liberty to proceed with the construction
79 and completion of its railroad from Canon City, in the county of Fremont, through the certain defile known as the Grand Canon of the Arkansas, and along the line marked in its plat, map or profile of the survey of said road heretofore, and on the 23d day of July, A. D. 1877, filed with the Receiver of the Land Office at Pueblo, Colorado, and bearing the approval of the Hon. Carl Schurz, Secretary of the Interior, to the end of the twentieth mile from Canon City, as marked on said map, and that the said defendant, its officers, agents, and servants,
80 do, from henceforth, absolutely desist and refrain from preventing, obstructing, or interfering with the construction of the said railroad along said line, or in any way or manner attempting so to do; but that the said defendant be at liberty, nevertheless, to construct its line of railroad from Canon City aforesaid, through the said canon and up the valley of the Arkansas, upon any proper route which it may select, within or without the plaintiff's way or right of way, provided it do not in the construction or operation thereof, obstruct or prevent,
81 or interfere with the construction or operation of the plaintiff's said road, along the line aforesaid, and with liberty to the said defendant, if necessary, to locate and construct its line of railroad across the railroad of said plaintiff upon the same grade therewith at the point or points, place or places of crossing; and that defendant have liberty at any time hereafter to exhibit its bill in this, or any court of competent jurisdiction, to compel the plaintiff to adhere to its line aforesaid, and to so

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change the line of its said road and locate and construct its road at all points on the line thereof, so as to permit the con- 82
venient and proper location and construction of defendant's road, or to compel the plaintiff to permit the defendant to occupy the track and roadway of the plaintiff, if at any point in said defile it shall be impracticable to conveniently construct or safely operate two lines of railroad.

Ordered that the defendant have liberty to make surveys at any reasonable time of the line of the plaintiff's railroad, but so as not to unnecessarily interfere with the plaintiff's working parties or engineers engaged thereon; that, if the defendant shall lay its line of road in any part thereof, in that 83
part of said canon known as Royal Gorge, commencing at or about the center of the northwest quarter of section twenty-six, at a point seven or eight hundred feet above a ravine, coming in from the north, on said river, and extending up said river to the center of the south half of the northwest quarter of section twenty-two, township eighteen, south of range seventy-one west, in the county of Fremont, supposed to be about sixty-six hundred feet in length, on the opposite side of said river from the plaintiff's road, then defendant may proceed at once to the construction of its road in those parts 84
thereof; but wherever defendant's road shall, within the limits above defined, be located upon the same side of the river with the plaintiff's road, the defendant shall not, at any point, attempt to construct its road until the plaintiff shall have completed its road at such place; provided plaintiff shall complete its road between the limits aforesaid within six months of the rendition of this decree.

Ordered that plaintiff recover its costs and have execution therefor."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme

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85 Court of the United States, by virtue of an appeal agreeably to the act of Congress in such case made and provided fully and at large appears,

And Whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel: on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause, be, and the same is hereby
86 reversed, with costs; and that the said defendant recover against the said complainant, the Canon City and San Juan Railway Company ..... for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity with the opinion of this court.

21st April, 1879.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as accord-
87 ing to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the sixth day of May, in the year of our Lord one thousand eight hundred and seventy nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

COSTS OF DEFENDANT PAID BY COMPL'T, Taxed by

Clerk, - - $.....

Attorney, - - $.....

$.....

(endorsed)

155.

No. 812. October Term. 1878.

MANDATE

SUPREME COURT

UNITED STATES.

CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

vs.

DENVER AND RIO GRANDE RAILWAY COMPANY.

Filed May 13, 1879.

EDWARD F. BISHOP, *Clerk.*

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And afterwards and on the same day, to-wit: on the 13th day of May, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present, the Honorable Moses Hallet, District Judge, the following proceedings were had and entered of record in said court and in said cause, to-wit: —

ORDER: Defendant moves for decree.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,	In Chancery.
155 vs.	For an Injunction, etc.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	

At this day comes the said defendant, by H. A. Risley,

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89 Esq., its solicitor, and moves the court for a decree upon the mandate of the Supreme Court of the United States.

And afterwards and on the same day, to-wit: the 13th day of May, A. D. 1879, the following other proceedings were had and entered of record in said court, in said cause, to-wit: —

ORDER: Motion for Supplemental Bill argued and taken.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,	In Chancery.
155 vs.	For an Injunction, etc.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	

At this day comes the said complainant, by C. E. Gast, Esq., its solicitor, and the said defendant, by E. T. Wells, Esq., its solicitor, also comes:

90 And thereupon the said complainant moves the court for leave to file herein a supplemental bill of complaint and affidavits in support thereof, which is argued by counsel, and the court having heard the arguments of counsel, doth take the said motion under advisement.

And afterward, and on to-wit: the 15th day of May, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present, the Honorable Moses Hallet, District Judge, the following proceedings were had and entered of record in said court, and in said cause, to-wit: —

ORDER: Motion to file Supplemental Bill allowed.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

In Chancery. 91

For an Injunction, etc.

At this day comes the Pueblo and Arkansas Valley Railroad Company by C. E. Gast, Esq., its solicitor, and the said defendant by H. A. Risley, Esq., its solicitor, also comes.

And the said Pueblo and Arkansas Valley Railroad Company having lately and on the 13th instant exhibited to the court, and moved the court for leave to file its certain supplemental bill of complaint herein, and affidavits in support thereof,—in which said supplemental bill it is alleged, amongst other matters and things, that it, the said Pueblo and Arkansas Valley Railroad Company, is the successor of the complainant 92
in this cause: and the said motion having been argued by counsel and taken under advisement by the court, and the court being now sufficiently advised in the premises, it is ordered by the court for good and sufficient reason to the court appearing, that the said motion be granted.

And afterwards, and on to-wit: the 20th day of May, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present, the Honorable Moses Hallet, District Judge, the following proceedings were 93
had and entered of record in said court, and in said cause, to-wit:—

ORDER: Supplemental Bill to be filed within three days.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

In Chancery.

For Injunction and other relief.

At this day comes the said complainant by Willard Tel-

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ler, Esq., its solicitor, and the said defendant by E. T. Wells, Esq., its solicitor, also comes:

And thereupon, on motion of the said defendant, it is ordered that the Pueblo and Arkansas Valley Railroad Company file herein its supplemental bill of complaint within three
94 (3) days from this day, if at all.

And afterwards, and on to-wit: the 24th day of May, A. D. 1879, came the said complainant by Charles E. Gast, Esq., its solicitor, and filed in said court and in said cause its supplemental bill, and the said supplemental bill is in words and figures as follows, to-wit:

SUPPLEMENTAL BILL

—OF—

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY.

IN THE UNITED STATES CIRCUIT COURT,

DISTRICT OF COLORADO.

Eighth Judicial Circuit.

UNITED STATES OF AMERICA } ss.
District of Colorado. }

To the Honorable Judges of the Circuit Court of the United States, for the District of Colorado, in the Eighth Judicial Circuit.

The Pueblo and Arkansas Valley Railroad Company, a
95 corporation created, organized and existing under and by virtue of the laws of the State of Colorado, by leave of court first had and obtained, brings this its bill against the Denver and Rio Grande Railway Company, a corporation existing under the laws of the State of Colorado; and thereupon your orator complains and says:

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That on the 20th day of April, 1878, the Canon City and San Juan Railway Company exhibited its bill of complaint in the district court of Fremont county, Colorado, praying for certain injunctive relief against the said Denver and Rio Grande Railway Company; and that thereafter the proceedings 96
aforesaid were removed upon petition of the said Denver and Rio Grande Railway Company into this honorable court. That thereafter, on the 9th day of May, 1878, the said Canon City and San Juan Railway Company exhibited in this honorable court its amended bill of complaint, wherein, after reciting that it was a body corporate under the laws of the State of Colorado, and incorporated for the purpose of constructing, improving and maintaining a railroad, to carry passengers and freight between Canon City, in the county of Fremont, and the point known as the South Arkansas post-office, in Lake county, 97
Colorado, commencing at the said company's depot site in Canon City, to be thereafter selected; thence up the valley of the Arkansas river, through the Grand Canon thereof, and by the most practicable route following the Arkansas river to the said South Arkansas post-office; it was averred, that in the month of April, 1877, the said Canon City and San Juan Railway Company, to effectuate the purpose of its incorporation, did survey and locate its line over part of the route so designated in its certificate; and procure the approval of the plat and profile of its said located line by the Hon. Carl Shurz, secretary 98
of the interior, by virtue of a law of the United States, entitled "an act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875. That its located line aforesaid extended for a distance of twenty miles, through what is known as the Grand Canon of the Arkansas River, and that on the 19th day of April, 1878, it entered into the possession of the same, for the purpose of constructing its said railroad. That thereafter, the said Denver 99
and Rio Grande Railway Company did invade the possession of the said Canon City and San Juan Railway Company with

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a large number of men, and with intent to injure the said Canon City and San Juan Railway Company, and hinder and delay the construction of its said railroad, did remove its stakes and grade-pegs, and threaten to exclude the said Canon City and San Juan Railway Company, and its employees, from its located line through the canon aforesaid. And that said bill of complaint therefore prayed injunctive relief against the said defendant, the Denver and Rio Grande Railway Company, to
100 restrain it, its agents and employees from entering upon the possession of the located line aforesaid, of the said Canon City and San Juan Railway, or from attempting to occupy the same, or from interfering with its construction, or doing any act or thing to hinder or obstruct its employees in the prosecution of their work, or from constructing, or attempting to construct any line of railroad over and upon the line so located as aforesaid.

Your orator further shows, that the said defendant, the Denver and Rio Grande Railway Company, put in its answer to the bill of said complaint, of the Canon City and San Juan
101 Railway Company, and by its said answer admitted some of the allegations of the said bill of complaint, and denied others, to be true.

Further, that on the 27th day of April, the said Denver and Rio Grande Railway Company exhibited to this honorable court its bill of complaint against Ebenezer T. Alling, M. N. Megrue, Benjamin F. Rockafellow, Henry N. Holbrook, Wm. F. Bailey, Fred A. Reynolds, W. R. Morley, A. A. Robinson, James Clelland, William B. Strong and the Atchison, Topeka and Santa Fe Railroad Company, setting forth that the said Denver and Rio Grande Railway Company
102 was a corporation organized under and by virtue of the laws of Colorado, for the purpose of locating, constructing, operating and maintaining, among other railways and telegraph lines, mentioned in its certificate of incorporation, the Denver and Rio Grande Railway, commencing at Denver, Colorado,

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and running thence by a route in said certificate designated, to a point on the Arkansas river at or above Pueblo, thence up the valley of the Arkansas river to a point at or near Canon City, thence continuing up the valley of the Arkansas through the big canon of the same to a point at or near the mouth of the South Arkansas river; and thence by way of the Rio 103
Grande Valley to El Paso. That on the 8th day of June, A. D. 1872, Congress passed a certain act entitled "an act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," and granted thereby the right of way to the said company, one hundred feet in width on each side of the track, across the public lands, for the purpose of its said railway, together with other rights therewith connected and to be used; which said grant was subject to the provisions that the said company should complete its railway as far south as Santa Fe on the Rio Grande 104
river within five years from the passage of said act; which said limitation was afterwards by act of Congress, approved March 3rd, 1877, extended to ten years from the passage of said first mentioned act. That relying upon its grant of right of way aforesaid, which the said company claimed to confer an exclusive right to occupy the Grand Canon of the Arkansas for the purpose of its road, the said company constructed its road from Denver to Pueblo, and afterwards to Canon City, and in the years 1871 and 1872 did, throughout the length of the Grand Canon, survey a line and designate the same by stakes, 105
and in sundry places grade the bed of a railway; and on the 19th day of April, 1878, began to resume the work of constructing its railway from Canon City through the Grand Canon of the Arkansas. That the defendants, Ebenezer T. Alling, James Clelland, Henry R. Holbrook, B. F. Rockafellow, John Locke, M. N. Megrue, William F. Bailey, Fred. A. Reynolds and Samuel P. Dale, falsely styling themselves "The Canon City and San Juan Railway Company," and falsely claiming to be a corporation by that name, on the said 19th 106

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day of April, 1878, did take possession of the mouth of said canon, and begin to locate and construct a railroad grade, upon and along the line located by the said Denver and Rio Grande Railway Company, in the years 1871 and 1872; and were threatening to dispossess the said company. That in their alleged wrongful conduct, they were instigated and aided by the Atchison, Topeka and Santa Fe Railroad Company, which said last mentioned company, by furnishing laborers and money, was confederating with the other defendants to anticipate and prevent the said Denver and Rio Grande Railway Company from occupying the said canon And that said bill of complaint therefore prayed injunctive relief against
107 the said defendants to restrain them from interfering with the surveyed line of the said Denver and Rio Grande Railway, as surveyed and located from Canon City through the Grand Canon of the Arkansas river, and from in any manner occupying or interfering with its way as theretofore located, and from obstructing or preventing its grading upon the line aforesaid, or from aiding, abetting or encouraging others so to do.

Your orator further shows that the defendants, Ebenezer T. Alling, M. N. Megrue, B. F. Rockafellow, H. N. Holbrook, W. F. Bailey, F. A. Reynolds and James Clelland, filed joint and several answers thereto, admitting some of the allegations of the said bill of complaint, and denying others, to be true,
108 and justifying their occupation of the said Grand Canon, not by individual right, but as incorporators of the said Canon City and San Juan Railway Company, and in the name of the said last mentioned company, under and by virtue of its surveys and location, and the approval of its plat by the honorable Secretary of the Interior, under the aforesaid act of Congress, approved March 3d, 1875. And the Atchison, Topeka and Santa Fe Railroad Company also filed its separate answer to the said bill of complaint, denying some of the allegations therein, but admitting that it expected to derive profit and ad-

vantage from the construction of the said Canon City and San Juan Railway, and that for the reason aforesaid it had furnished money to the said Canon City and San Juan Railway Company, for the purpose of completing its road, and averring its willingness to still further assist the said company in the manner aforesaid. 109

Your orator further shows, that the two said original bills of complaint presented substantially the same matters of controversy for the determination of this honorable court, and that after issues joined thereupon, witnesses were examined in the said causes, and proofs taken therein, and that the said causes came on to be heard at the July term, A. D. 1878, of 110 this court, to-wit: on the 24th day of August, A. D. 1878, when upon debate of the matters and the proofs taken in said causes read, and what was argued by counsel on both sides, the court ordered, adjudged and decreed, that as to the said bill filed by the Canon City and San Juan Railway Company, against the Denver and Rio Grande Railway Company, and the relief prayed therein, the said plaintiff be at liberty to proceed with the construction and completion of its railroad from Canon City through the Grand Canon of the Arkansas, and along the line marked in its plat, map, or profile, filed with the 111 receiver of the land office, and bearing the approval of the honorable Secretary of the Interior, to the end of the twentieth mile from Canon City, and that the said defendant desist and refrain from interfering with the construction of said railroad along said line; but that said defendant be at liberty nevertheless to construct its line of railroad from Canon City aforesaid, through the said canon and up the valley of the Arkansas upon any proper route which it may select within or without the plaintiff's right of way, provided it do not, in the construction or operation thereof, obstruct or prevent or inter- 112 fere with the construction or operation of the plaintiff's said road along the line aforesaid, and with liberty to the said defendant, if necessary, to locate and construct its line of railroad

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across the railroad of said plaintiff upon the same grade therewith, at the point or points, place or places of crossing; and that defendant has liberty at any time hereafter, to exhibit its bill in this or any court of competent jurisdiction, to compel the plaintiff to adhere to its line aforesaid, and to so change the line of its said road, and locate and construct its road at all
113 points of the line thereof, so as to permit the convenient and proper location and construction of defendant's road, or to compel the plaintiff to permit the defendant to occupy the track and roadway of the plaintiff, if at any point in said defile it shall be impracticable to conveniently construct or safely operate two lines of railroad; and that the defendant has liberty to make surveys at any reasonable time of the line of the plaintiff's railroad, but so as not to unnecessarily interfere with the plaintiff's working parties or engineers engaged thereon; and that if the defendant shall lay its line of road in any part thereof in that part of said canon known as Royal
114 Gorge, commencing at or about the center of the northwest quarter of section twenty-six, at a point seven or eight hundred feet above a ravine coming in from the north on said river, and extending up said river to the center of the south half of the northwest quarter of section twenty-two, township eighteen, south of range seventy-one west, in the county of Fremont, supposed to be about sixty-six hundred feet in length, on the opposite side of said river from the plaintiff's road, then defendant may proceed at once to the construction of its road in those parts thereof; but wherever defendant's
115 road shall, within the limits above defined, be located upon the same side of the river with the plaintiff's road, the defendant shall not at any point attempt to construct its road until the plaintiff shall have completed its road at such place; provided plaintiff shall complete its road between the limits aforesaid within six months of the rendition of the decree aforesaid.

And as to the said bill exhibited by the Denver and Rio

Grande Railway Company against the aforesaid incorporators of the Canon City and San Juan Railway Company, to-wit: Ebenezer T. Alling, and others, and the Atchison, Topeka and Santa Fe Railroad Company, it was ordered, adjudged and 116
decreed that the said plaintiff's bill of complaint do stand dismissed at the cost of said plaintiff; but with liberty to the said plaintiff, nevertheless, at any time hereafter, to exhibit its bill in this or any court of competent jurisdiction, to compel the said Canon City and San Juan Railway Company to adhere to its said line, or to compel said company to so locate and construct its line of railroad, or to so change the line and grade thereof at any point or points, place or places in or along thereof, as to permit of the convenient and proper location and construction of the plaintiff's road, or to compel the defendant to permit the plaintiff to occupy the track or roadway of the defendant, if at any point in said defile it shall be deemed im- 117
practicable to conveniently construct or safely operate two lines of railroad.

Your orator further shows, that thereupon and immediately, the said Denver and Rio Grande Railway Company prosecuted appeals to the supreme court of the United States from the two final decrees hereinbefore recited and in terms set forth, and that the said appeals came on to be heard upon the records aforesaid, and the arguments of counsel filed therein, at the December term, A. D. 1878, of the said supreme court; and that on the 21st day of April, A. D. 1879, 118
there was filed the opinion of the said supreme court, setting forth that in the records and proceedings aforesaid there is error, in this, that in the decree aforesaid the prior right of the said Denver and Rio Grande Railway Company to locate and construct a railroad through the said Grand Canon is not recognized and protected. That, therefore, the decrees aforesaid were reversed, and the causes remanded to this honorable court with certain directions, which will more fully appear by the opinion of the said supreme court, to which, for this pur-

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119 pose, your orator craves leave at all times to refer. And that thereafter, on the 13th day of May, A. D. 1879, the mandate of the said supreme court was returned to and filed in this honorable court, as by the said bills of complaint, the answers thereto, the decrees and other proceedings now remaining of record in this honorable court, reference being thereunto had, will appear.

Your orator further represents that after the prosecution of the appeals aforesaid to the supreme court of the United States, by the said Denver and Rio Grande Railway Company, the said Canon City and San Juan Railway Company, and the
120 Pueblo and Arkansas Valley Railway Company, a corporation theretofore existing under the laws of the state of Colorado, at meetings of their stockholders called and held by said companies respectively on the 2nd and 3rd days of September, 1878, did resolve to and did form one consolidated corporation, as they were by law authorized to do, and did thereby merge and consolidate their respective capital stocks, franchises, rights and property, into one consolidated corporation, to be styled "The Pueblo and Arkansas Valley Railroad Company," (your orator herein); and a certificate of such consolidation and incorporation of such new company, under
121 the name aforesaid, was duly executed and acknowledged, and was, on the 12th day of September, 1878, filed for record in the office of the secretary of the state of Colorado, and with the recorders of the several counties wherein the business and operations of said company were to be carried on; a certified copy of said certificate is hereto attached, marked "Exhibit A," which your orator prays may be deemed and considered a part of this bill of complaint. And thereafter the directors of the said original corporations, so consolidated as aforesaid, did by proper conveyance transfer and set over to the said consolidated company, all the property, real, personal, and
122 mixed, and the rights, privileges, and franchises of the said two original corporations; and the directors of the said con-

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solidated company did call in all the shares of stock of the said original corporations, and issue in lieu thereof the shares of the said consolidated corporation.

Your orator further shows, that the said Pueblo and Arkansas Valley Railroad Company has constructed, and now owns a line of railroad, commencing at the western terminus of the Atchison, Topeka and Santa Fe Railroad, at the boundary line between the states of Kansas and Colorado, and extending up the Arkansas river to the city of Pueblo, and that the same is leased to and operated by the Atchison, 123
Topeka and Santa Fe Railroad Company, and forms in connection with the said Atchison, Topeka and Santa Fe Railroad, a continuous line for travel from the city of Pueblo to the Missouri river.

Your orator further represents by way of supplemental to the proceedings hereinbefore recited, as of record in this honorable court, between the said Denver and Rio Grande Railway Company, and the said Canon City and San Juan Railway Company, and the said Atchison, Topeka and Santa Fe Railroad Company, that after the prosecution of the appeals aforesaid to the supreme court of the United States, 124
to-wit: on the 4th day of October, A. D. 1878, the Atchison, Topeka and Santa Fe Railroad Company, represented by its president, Thomas Nickerson, your orator, the Pueblo and Arkansas Valley Railroad Company, represented by its president, Joseph Nickerson, and the defendant, the Denver and Rio Grande Railway Company, represented by Joseph D. Potts and S. B. Schlessinger, entered into and signed a certain protocol or memorandum, of an agreement to be made between the said companies, whereby the Atchison, Topeka and Santa Fe Railroad Company promised to take a lease of the said Denver and Rio Grande Railway for the term of thirty 125
years, upon certain terms and conditions; and the said Pueblo and Arkansas Valley Railroad Company guaranteed that its total debt did not exceed $11,780 per mile of constructed

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road, and that its stock did not exceed $15,438 per mile of constructed road; and the said Denver and Rio Grande Railway Company likewise guaranteed that the total debt did not exceed $22,664 per mile of constructed road, and that its stock did not exceed $25,220 per mile of constructed road. That the said agreement was afterwards approved by William
126 J. Palmer, president of the defendant corporation, and a copy of the same is hereto attached, marked "Exhibit B," which your orator prays may be taken and considered a part of this bill of complaint, with leave at all times to refer to the same.

That afterwards, to-wit: on the 19th day of October, A. D. 1878, in pursuance of and to effectuate the purpose of the said preliminary agreement, the said defendant, the Denver and Rio Grande Railway Company, executed to the said Atchison, Topeka and Santa Fe Railroad Company, the lessee of your orator as aforesaid, a lease of its entire constructed line of railway, to continue for the term of thirty years from
127 December 1st, 1878, in consideration of a certain rental therein stated to be paid, and of certain covenants therein mentioned to be kept and performed. A copy of said lease is hereto attached, marked "Exhibit C," and your orator prays that the same may be taken as a part of this bill, and that it may have leave at all times to refer to the same.

That contemporaneously with the execution of said lease and as a part of the same transaction, there was executed a certain contract between William J. Palmer, president of the Denver and Rio Grande Railway Company, and Alden Speare, of Boston, Massachusetts, one of the directors of
128 your orator, the Pueblo and Arkansas Valley Railroad Company, a copy of which said contract is hereto attached, marked "Exhibit D," which your orator prays may be likewise considered a part of this bill of complaint.

And contemporaneously therewith, and as a part of the same transaction, a certain other contract was executed be-

tween the said Atchison, Topeka and Santa Fe Railroad Company and the defendant, the Denver and Rio Grande Railway Company, a copy of which is hereto attached, marked "Exhibit E," which your orator prays may be likewise considered a part of this bill of complaint.

Your orator further says, that all business and traffic in- 129
terchanged between the lines of the said Atchison, Topeka and Santa Fe Railroad Company and those of the defendant, passes over the railroad of your orator, and that the contracts aforesaid were made as much for the benefit of your orator as for the benefit of the said Atchison, Topeka and Santa Fe Railroad Company, and that in fact they so enure.

That after the execution of the said lease, the same was duly ratified and confirmed by the directors of the Atchison, Topeka and Santa Fe Railroad Company, and also by the 130
stockholders of the said Denver and Rio Grande Railway Company, at a meeting of the latter duly convened for that purpose, on the 29th day of November, 1878, the same by the resolution of the stockholders aforesaid, to become effectual when possession thereunder should be given by order of the president of the said company to the lessee.

Your orator further represents that possession of the said demised railroad, its rolling stock and appurtenances, was given to the Atchison, Topeka and Santa Fe Railroad Company, lessee as aforesaid, on December 14th, 1878, and that the said Atchison, Topeka and Santa Fe Railroad Company is now, and has been since the date aforesaid, in possession of 131
the same, operating the said demised railroad under its lease.

That in accordance with and as provided by the agreement executed between William J. Palmer and Alden Speare, forty-two thousand five hundred and ten (42,510) shares of the capital stock of the said Denver and Rio Grande Railway Company, (the same being a majority thereof,) have been transferred to a trustee and are now held in trust for your

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orator, whereby your orator holds a controlling interest in the management of the affairs of the said defendant company.

132 Your orator further shows, that when the contracts aforesaid were executed, your orator, the Pueblo and Arkansas Valley Railroad Company, and the defendant, the Denver and Rio Grande Railway Company, were engaged in rival and competitive construction of their respective lines of railroad—that is to say, the Pueblo and Arkansas Valley Railroad Company was extending its road from its western terminus at Pueblo to Canon City, and thence through the canon of the Arkansas river to South Arkansas and Leadville, and had expended upon the construction of its said road through the
133 Grand Canon, and over the ground in controversy in the suits aforesaid, about the sum of one hundred and seventy-five thousand dollars, and was surveying a line of road parallel to that of the Denver and Rio Grande Railway between Pueblo and Denver; and the Denver and Rio Grande Railway Company was pretending to build between Canon City and the mouth of the South Arkansas river, and under pretense aforesaid, had in its employ a small number of men, not engaged in systematic construction, but nevertheless subjecting the contractors of the Pueblo and Arkansas Valley Railroad Company to great annoyance and hardship, by constantly and malicious-
134 ly interfering with their work of grading the road-bed of the said last mentioned company. That these controversies and conflicts, both in and out of the courts, were very disastrous to the interests of both corporations, and that the contracts aforesaid were made with the intent and design of ending the controversies between the two companies, and particularly the interference then existing and growing out of the conflicting claims of the said companies to their located lines from Canon City westward to South Arkansas and Leadville; and that for the purpose aforesaid, the defendant and your orator further agreed, that the defendant should abandon the claim to the
135 located line of your orator upon the ground in controversy

through the Grand Canon, and that in consideration thereof your orator, at the request of the defendant, agreed to give new contracts for work upon your orator's located line to the parties with whom defendant had contracted, so as to protect the defendant against any claim for damages by reason of the defendant's abandonment of its work. That said contracts were duly executed, and the defendant was indemnified against loss by your orator giving such new contracts; and that after the contracts aforesaid were executed, the Pueblo and Arkansas Valley Railroad Company abandoned the extension of its 136
line from Pueblo to Canon City, then under construction, and also abandoned its contemplated extension from Pueblo to Denver.

Your orator further charges, that after the appeals aforesaid were prosecuted to the supreme court of the United States, the Denver and Rio Grande Railway Company surveyed and located a line, and began construction thereon, and graded over a distance of about three miles in and above said canon, which said location extended from Canon City through the Grand Canon of the Arkansas river upon the south side of the river, and was in no respect in conflict with the location of 137
the Pueblo and Arkansas Valley Railway upon the north side of the river; and that after the execution of the contracts aforesaid, the contractors and employees of the said Denver and Rio Grande Railway Company, then at work upon the located line of the defendant in the said canon, were discharged and their contracts canceled, as it was agreed should be done, and the said contractors were by agreement between your orator, the Pueblo and Arkansas Valley Railroad Company and the defendant, taken into the employ of the Pueblo and Arkansas Valley Railroad Company, and given new contracts by said last named company.

Further, that after the lease and other contracts were ex- 138
ecuted, William J. Palmer, president of the defendant company, issued a circular to the stockholders of the said company, call-

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ing upon and requesting them to surrender to him their shares of Denver and Rio Grande Railway stock, and receive in lieu thereof shares of the Pueblo and Arkansas Valley Railroad Company; representing in said circular as an inducement for stockholders to make the exchange, the great profits and advantages that would accrue to holders of the last named stock from the completion of the Pueblo and Arkansas Valley Railroad to Leadville.

139 Your orator is advised by counsel, and believes that the lease and other contracts aforesaid, and the acts and doings of the said defendant, herein averred by way of supplement, constitute a release of any errors there may be in the decrees of this honorable court, heretofore set forth in terms, and that whatever prior right the said defendant had to construct a line of railroad through the Arkansas canon, cannot now be availed of to the prejudice or injury of your orator. It well hoped that after the execution of the contracts aforesaid, this litigation
140 would cease and determine. But now so it is, that the officers of the said defendant company, contriving how to wrong and injure your orator in the premises, refuse to comply with such request, and they at times pretend that the contracts aforesaid do not concede or recognize the right of your orator to continue its construction through the Arkansas canon upon the located line.

Your orator states that stockholders of the defendant company holding a large majority in value of the shares of capital stock of said company, did on February 8th, 1879, formally apply to William J. Palmer, president of said company, to call a meeting of the said stockholders for the pur-
141 pose of taking corporate action as to whether any further expenditures should be made in extending the said company's line west of Canon City, and that the said William J. Palmer refused, and still does refuse to permit the stockholders of defendant to determine by corporate vote whether the acts

and doings of its officers in the premises are the will of the corporation.

Your orator states, that since the passing of the decrees aforesaid by this honorable court, the Pueblo and Arkansas Valley railroad has been fully completed through the Grand Canon of the Arkansas river; that acting largely upon the faith of the lease and other contracts herein set forth, and 142
upon the security of the rights given to your orator thereunder, and by a large expenditure of money, the said railroad has been graded, bridged and ironed, and is ready for successful operation. Your orator is therefore advised that under the aforesaid circumstances, the said causes remanded from the supreme court of the United States should be heard on the supplemental matters aforesaid, at the same time they are heard on the original records therein.

All of which actings, doings and pretences of the said defendant are contrary to equity and good conscience, and tend to manifest wrong, injury and oppression of your ora- 143
tor. In consideration whereof, and inasmuch as your orator is remediless in the premises, at and by the strict rules of the comon law, and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable.

To this end therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and that said causes may be heard on such new and supplemental matter as aforesaid, and that upon the hearing the original decrees herein may be permitted to stand without modification or change. May it please your honors to grant unto your orator a writ of subpœna in chancery, directed to 144
the said Denver and Rio Grande Railway Company, defendant, issuing out of and under the seal of this honorable court, commanding it at a time under a penalty to be therein named, to full and true answer make herein, but not under oath (the same being expressly waived); and may it please your honors

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to grant such other and further relief in the premises as the circumstances of the case may require. Your orator will ever pray, etc.

[Signed,] THE PUEBLO & ARKANSAS VALLEY RAILROAD COMPANY,

BY CHAS. E. GAST, *its Solicitor.*

G. B. REED,
WILLARD TELLER,
of Counsel.

145 [Signed,] THE PUEBLO & ARKANSAS VALLEY RAILROAD COMPANY,

BY M. D. THATCHER, *Sec'y.* [SEAL.]

STATE OF COLORADO, } SS.
County of Pueblo. }

Be it remembered, that on this 19th day of May, 1879, personally appeared before me M. D. Thatcher, secretary of the Pueblo and Arkansas Valley Railroad Company, and upon his corporal oath does say that he has heard read the foregoing bill of complaint, and knows the contents thereof, and that the same are true of his own knowledge, except as to such matters therein stated to be on information and belief, and as to those, he believes it to be true.

Given under my hand and notarial seal, this 19th day of May, 1879.

146 [Signed,] R. F. LYTLE,

[NOTARIAL SEAL.] *Notary Public.*

EXHIBIT "A."

ARTICLES OF MERGER, CONSOLIDATION AND INCORPORATION OF THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY.

Whereas, at a special meeting of the stockholders of the Pueblo and Arkansas Valley Railroad Company, held at Pueblo, Colorado, on the second (2d) of September, A. D. 1878, there was submitted a proposition for consolidating and merging the capital stock, franchises and property of the said Pueblo and Arkansas Valley Railroad Company, with the capital stock, franchises and property of the Canon City and San Juan Railway Company, and thereby severally and collectively to merge and consolidate the capital stock, franchises and property of each of said corporations, with the capital stock, 147
franchises and property of the other, and into one consolidated corporation, subject to all liabilities, charges and responsibilities thereto by law consequent and appertaining; which said proposition, and the terms and conditions thereof, had been previously thereto agreed upon, subject to the ratification of the stockholders aforesaid, by the executive committee of the board of directors of the Pueblo and Arkansas Valley Railroad Company, and the president, secretary and treasurer of the Canon City and San Juan Railway Company in that behalf duly authorized by the said several corporation parties; and

Whereas, at the aforesaid meeting of the stockholders of 148
the Pueblo and Arkansas Valley Railroad Company, the said proposition of consolidation was approved, ratified and confirmed by a vote of more than three-fourths of the capital stock of said company; and

Whereas, at a special meeting of t e stockholders of the Canon City and San Juan Railway Company, held at Canon City, Colorado, on the third (3d) day of September, 1878, the same proposition of consolidation and merger was submitted

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and was likewise approved, ratified and confirmed by a vote of more than three-fourths of the capital stock of the said company.

149 Now, therefore, this is to certify: That in consideration of the proceedings aforesaid, and of the mutual agreements, covenants, provisions and grants in said proposition contained, the said several corporations have merged, combined and consolidated their respective capital stocks, franchises grants, immunities, privileges, capacities, properties and rights of way of every name and nature, into one consolidated company, to be called and known by the corporate name and style of "The Pueblo and Arkansas Valley Railroad Company."

This is to certify further: That by the said proposition of consolidation the following appear as the terms and condi-
150 tions thereof:

ARTICLE I. The following named persons have been chosen the first directors of the said consolidated company, and shall act as such until the next annual election of directors, as herein prescribed, and until their successors are duly elected: Joseph Nickerson, Thomas Nickerson, F. H. Peabody, M. D. Thatcher, O. H. P. Baxter, George B. Wilbur, B. P. Cheney, Isaac F. Burr and William B. Strong.

ARTICLE II. The number of the directors of said consolidated company shall be not less than nine (9) nor more than
151 thirteen (13); the number of directors shall remain nine (9), as constituted by the preceding article, until the same is changed by a vote of the stockholders, at an annual meeting.

ARTICLE III. The first regular annual meeting of the stockholders of said consolidated company shall be held on Saturday, the tenth (10th) day of May, 1879.

ARTICLE IV. The present officers, agents and committees of the Pueblo and Arkansas Valley Railroad Company shall remain the officers, agents and committees of the said

consolidated company, with like powers and duties, until at a meeting of the directors of the consolidated company the same are changed; and the present by-laws of the Pueblo and Arkansas Valley Railroad Company, so far as the same 152
do not conflict with these articles, shall remain for the government of the consolidated company until the same are altered or repealed.

ARTICLE V. The capital stock of the consolidated company shall be the aggregate of the capital stocks of the said several corporations, to-wit:

Six million one hundred thousand dollars ($6,100,000), divided into sixty-one thousand shares (61,000) of one hundred dollars ($100) each.

ARTICLE VI. The corporate seal of the consolidated company shall be that of the late Pueblo and Arkansas Valley Railroad Company, until otherwise ordered by the stockholders; and the term of corporate existence shall continue 153
for fifty (50) years from the date of filing these articles.

ARTICLE VII. The principal office and place of business of the consolidated company shall be at the city of Pueblo, Pueblo county, state of Colorado, and the operations of the company shall be carried on along the lines of the routes hereinafter designated.

ARTICLE VIII. The corporate purposes of the said consolidated company shall be to locate, construct, own, possess, operate and maintain certain railroad and telegraph lines, and to lease and operate any other lines connecting therewith, as follows, that is to say:

Main line, commencing at a point at the present western 154
terminus of the Atchison, Topeka and Santa Fe Railroad, in the Arkansas Valley, at or near the eastern boundary of the state of Colorado; thence westerly and northwesterly, following the general direction of and along said valley of the Arkansas river or the slopes thereof, through the counties of

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Bent and Pueblo to the city of Pueblo, in said state; thence continuing along the valley of said river to Canon City, in the county of Fremont, in said state; thence in a westerly direction along said Arkansas river and the tributaries thereof to Pleasant valley, and still continuing along the valley of said
155 Arkansas river and the slopes thereof, through the county of Lake to Tennessee pass, and across said pass by such route as may be determined upon after a survey thereof, to the western boundary of the state of Colorado, through Park and Summit counties.

1st. A branch from the said main line extending from the most suitable point thereon east of the city of Pueblo, and extending in a westerly and southwesterly direction through the counties of Bent and Las Animas to Trinidad, and thence in a southerly direction to the southern boundary of the state of Colorado, and to Santa Fe and Albuquerque, in the territory of New Mexico.

156 2d. A branch having its initial point on the said main line, between the city of Pueblo and Canon City, at or near the confluence of the Arkansas river and Oak creek; thence up Oak creek and the slopes and tributaries thereof to the headwaters of said creek, through the counties of Fremont and Custer.

3d. A branch having its initial point on the main line at or near the mouth of California gulch, and extending up said gulch through the towns of Malta and Leadville, to Oro City, in Lake county.

4th. Also a branch having its initial point on the said main line at or near the mouth of the South Arkansas river,
157 in Lake county; thence along the valley of the South Arkansas river and the slopes thereof, to a point near the mouth of Poncha creek; thence up the canon of said Poncha creek, to a point at or near the south forks of said Poncha creek; thence along the valley of said Poncha creek, and the slopes and

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tributaries thereof, to the summit of Poncha pass; thence continuing in a southerly direction through the San Luis valley to Saguache and Del Norte on the Rio Grande river; thence up the valley of the Rio Grande through Wagon Wheel Gap and Antelope Park to the headwaters of the said Rio Grande river; thence through Stony and Cunningham 158
gulches; or by any other route deemed more practicable on survey, into Baker's park; thence down the valley of the Animas river and along the slopes thereof to its confluence with the San Juan river; thence in a westerly direction down the valley of the said San Juan river, to the western boundary of the state of Colorado; the said branch extending through the counties of Lake, Saguache, Rio Grande, Hinsdale, La Plata and San Juan.

5th. Also, a branch having its initial point in the valley of Poncha creek, about five miles south of its confluence with the South Arkansas river; thence through Lake and 159
Gunnison counties along the valley of Poncha creek and the slopes and tributaries thereof, to Marshall's pass, at the summit of the main continental divide; thence down the valley of Tomichi creek and the slopes and tributary valleys thereof, into the valley of the Gunnison river, and along the valley of said river through the grand canon thereof, to the junction of the Gunnison and Cebolla canons; thence up the Cebolla canon and the valley and slopes of the Cebolla river to the divide between the Cebolla and Uncompahgre rivers; thence down the valley of Cedar Creek, a tributary of the Uncom- 160
pahgre, to the valley of the Uncompahgre; thence along the valley of the Uncompahgre and the slopes thereof, to the valley of the Gunnison river; thence along the valleys of the Gunnison and Grand rivers, or the tributary valleys and slopes thereof, to the western boundary of the state of Colorado.

6th. A branch, having its initial point at the junction of the Gunnison and Lake Fork canon, in Gunnison county;

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thence up the valley or tributary valleys of the Lake Fork of the Gunnison, to Lake City, in Hinsdale county.

7th. A branch, having its initial point in the most prac-
161 ticable point in the valley of Cedar creek, a tributary of the Uncompahgre, in Gunnison county; thence along the valley of the Uncompahgre, and the slopes and tributary valleys thereof, to Ouray, in Ouray county.

8th. A branch, having its initial point at the most practicable point in Antelope Park, near the mouth of Clear Creek; thence up Clear Creek and the slopes thereof to the summit of the main divide; thence by the most practicable route to Lake City.

9th. A branch, having its initial point at or near Saguache, in Saguache county; thence up the valley of Saguache
162 creek, the slopes and tributaries thereof, to Cochetopa pass, at the summit of the main divide; thence down Cochetopa creek, the tributary valley and slopes thereof, to the valley of Tomichi creek.

10th. A branch, having its initial point at or near the City of Pueblo; thence through Pueblo and El Paso counties by the most practicable route along the Fountain-que-Bouille to Colorado Springs; thence through El Paso county by the valley of the east Forks of the Fountain-que-Bouille to the divide between the Arkansas and Platte rivers; thence by the most practicable route along the tributary valleys of the Platte river, and the slopes thereof, to Denver, in Arapahoe
163 county; thence by the most practicable route, in a northwesterly direction, to a point near the outlet of Ralston creek from the mountains, in the county of Jefferson; thence by the most practicable and feasible route to the top of Guy hill, near where the old stage road crosses the same; thence on the southerly slope of Guy gulch, to a point at or above Boston's ranche; thence crossing said gulch and occupying the southerly slope of the mountains which lie between Guy

gulch and Clear creek, to a point known as Robinson's summit; thence along the southerly slope of the Robinson mountain by the most practicable and feasible route to Lake's ranche, 164
in Gilpin county; thence along the northerly slope of the mountain, by the most practicable and feasible route, to a crossing of Smith's creek or gulch, near the forks of said creek or gulch; thence on the southerly slope of the mountain to the city of Blackhawk, in said Gilpin county; thence by the most practicable and feasible route to Central City, in said county of Gilpin; thence running easterly upon the north slope of the mountain lying between Gregory and Lake gulches, and crossing said mountain east of "Bob Tail Hill"; thence deflecting westward by the most practicable and feasible route, passing at or near the consolidated Ditch Lake, at 165
the head of said Lake gulch; thence in a westerly direction on the most practicable and feasible route through Missouri City into the valley of Russell gulch, to the summit of the mountain at or near the head of Davenport gulch, at the north end of Bellevue mountain, on the line of Gilpin and Clear Creek counties; thence bearing northwesterly, by the most practicable and feasible route, upon the southerly slope of the mountain which drains into Fall river, in Clear Creek county, to a suitable crossing of said Fall river at or above Hamlin creek; thence crossing the ridge dividing the drainage of Fall river from South Clear Creek, by the most practicable and 166
feasible route to a point on said South Clear Creek, at or below the junction of the north and south branches of said creek; thence up the valley of the South Fork of said creek to the town of Georgetown, in said Clear Creek County, Colorado.

ARTICLE IX. Each and every existing bond, lease, agreement and obligation, action or liability heretofore entered into, assumed or agreed to by the late Pueblo and Arkansas Valley Railroad Company, or by the Canon City and San Juan

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Railway Company, shall be sacredly discharged, fulfilled and
167 observed by the consolidated company hereby created; and each and every of the acts, assumptions, proceedings, resolutions and doings of the respective boards of directors of the said companies, and of their authorized agents, officers and committees shall be, and the same are hereby ratified, confirmed and made valid, and shall be observed by the consolidated company.

ARTICLE X. From and after the consummation of this act of consolidation, the share or stockholders of the said several corporations shall be share or stockholders in the consolidated corporation hereby created and established, and shall
168 be entitled and hold therein a number of shares equal to the aggregate number held by them respectively in each and both of the corporations hereby merged and consolidated; and the directors of the consolidated company, acting by their appropriate officers, shall call in all the stock of the several corporations and cancel the same, and issue in lieu thereof a like number of the shares of the consolidated company, share for share alike; and the shares of the consolidated company shall be identified and distinguished from the shares of the late Pueblo and Arkansas Valley Railroad Company by having printed or stamped upon the face thereof the word "Consolidated."

169 ARTICLE XI. All and singular the rights, privileges and franchises of each of said several corporations, and all property, real, personal and mixed, and all debts due on whatever accounts, as well as of stock subscriptions and other things in action belonging to each of the said corporations, shall be taken and deemed transferred and vested in the consolidated corporation hereby established, without other or further act ordered than these presents; and all property, rights of way, and all and every other interest shall be as effectually the property of the consolidated company as they were of the for-
170 mer corporations, and all rights of creditors and liens upon the property created by either of said corporations shall be pre-

served unimpaired, nothwithstanding said merger and consolidation; and all debts, liabilities and duties of either of said corporations so merged shall henceforth attach to the said new corporation, and be enforced against it to the same extent and in the same manner as if said debts, liabilities and duties had been incurred and contracted by it.

This is to certify further, that the government of the said consolidated company and the management of its affairs will be vested in the following officers, as created by the by-laws of the late Pueblo and Arkansas Valley Railroad Company: President, treasurer, assistant treasurer and secretary. 171

In witness whereof, we, the undersigned, M. D. Thatcher, O. H. P. Baxter and Chas. E. Gast, of Pueblo, Colorado, stockholders in the late Pueblo and Arkansas Valley Railroad Company, and Frederick A. Raynolds, B. F. Rockafellow and James Clelland, of Canon City, Colorado, stockholders of the Canon City and San Juan Railway Company, have hereunto set our hands and seals this fifth (5th) day of September, 1878, in compliance with section 125 of an act of the Colorado legislature, approved March 14, 1877, entitled "An act to provide for the formation of corporations."

M D THATCHER [SEAL]
O H P. BAXTER [SEAL]
CHAS. E GAST [SEAL]
FREDERIC A. RAYNOLDS. [SEAL]
BENJAMIN F ROCKAFELLOW. [SEAL]
JAMES CLELLAND. [SEAL] 172

STATE OF COLORADO, } ss.
Pueblo County. }

I, Robert F. Lytle, a notary public in and for said county, in state aforesaid, do hereby certify that M. D. Thatcher, O. H. P. Baxter and Chas. E. Gast, personally known to me to be the persons who subscribed the foregoing certificate, appeared

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before me this day in person and acknowledged that they signed and sealed the same as their free act and deed.

Given under my hand and notarial seal this tenth day of September, A. D. 1878.

ROBERT LYTLE,
Notary Public.

[NOTARIAL SEAL.]

STATE OF COLORADO, } SS.
Fremont County. }

173 I, Charles E. Waldo, a notary public in and for said county, in the state aforesaid, do hereby certify that Frederic A. Raynolds, Benjamin F. Rockafellow and James Clelland, personally known to me to be the persons who subscribed the foregoing certificate, appeared before me this day in person and acknowledged that they signed and sealed the same as their free act and deed.

Given under my hand and notarial seal this tenth day of September, A. D. 1878.

CHAS. E. WALDO,
Notary Public.

[NOTARIAL SEAL.]

STATE OF COLORADO, } SS.
Secretary's Office. }

I, N. H. Meldrum, secretary of the state of Colorado, do hereby certify that the foregoing is a full, true and complete
174 transcript of "The articles of merger, consolidation and incorporation of the Pueblo and Arkansas Valley Railroad Company," which were filed in my office on the twelfth day of September, A. D. 1878, at nine o'clock A. M. of said day, and were admitted to record.

In testimony whereof, I have hereunto set my hand, and affixed the great seal of the state of Colorado, at the city of Denver, this seventh day of May, A. D. 1879.

[SIGNED.] N. H. MELDRUM,
[SEAL OF COLORADO.] *Secretary of State.*

EXHIBIT "B."

MEMORANDUM OF POTTS-SCHLESINGER AGREEMENT.

MEMORANDUM OF AGREEMENT, To be made between the 175
Atchison, Topeka and Santa Fe Railroad Company, represented by its president, Thomas Nickerson, the Pueblo and Arkansas Valley Railroad Company, represented by its president, Joseph Nickerson, and the Denver and Rio Grande Railway Company, represented by Joseph D. Potts and Sebastian B. Schlesinger.

First. The Atchison, Topeka and Santa Fe Railroad Company is to take a lease of the Denver and Rio Grande Railway Company, to terminate November second, A. D. nineteen hundred and eight, and is to operate the road of the Denver and Rio Grande Railway Company, paying as rental thirty- 176
five per cent. of the gross earnings of the leased road, and such further percentage thereof as may be agreed on by the presidents of the two roads, or in default of their agreement, as shall be fixed by a referee to be agreed on by them, whose award shall be final.

And in estimating the gross earnings on passengers and freight carried over the Denver and Rio Grande Railway, and also over a whole or a part of either of the roads named, each mile of transportation over the Denver and Rio Grande Railway shall be reckoned equal to a mile and one-quarter on either of the other roads named, except that transportation over the Leadville or Canon City branch shall be reckoned as equivalent mile for mile. 177

Of the above named rental, any surplus after paying the interest on the bonds and debt of the Denver and Rio Grande Railway Company shall be devoted to the purchase and extinguishment of the bonds and debt of the Denver and Rio Grande Railway Company, at the best market price, to be ascertained by advertising for bids, but at not exceeding ten per cent. above par.

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In case of competing trade, an equitable division of traffic shall be made.

The Pueblo and Arkansas Valley Railroad Company agrees to purchase within one year from the date hereof all
178 the stock of the Denver and Rio Grande Railway Company, which shall be offered it from time to time, as offered after the second day of November next, paying one share of its stock for every five shares of the Denver and Rio Grande Railway Company, and the Denver and Rio Grande Railway Company agrees that it will furnish or cause to be conveyed at the above rate, at least ten shares more than one-half of its entire capital stock, within sixty days from the date hereof.

The Pueblo and Arkansas Valley Railroad Company guarantees that its total debt does not exceed eleven thousand seven hundred and eighty dollars per mile of constructed
179 road, and that its stock does not now exceed fifteen thousand four hundred and thirty-eight dollars per mile of constructed road; and the Denver and Rio Grande Railway Company guarantees that its total debt does not exceed twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, and that its stock does not exceed twenty-five thousand two hundred and twenty dollars per mile of constructed road.

The directors of the Atchison, Topeka and Santa Fe Railroad Company shall nominate two-thirds of the board of directors of the Denver and Rio Grande Railway Company.

180 The lease above mentioned to take effect on the second day of November next, or as soon thereafter as may be practicable, and the Denver and Rio Grande Railway Company agrees to make a lease on the foregoing terms. The lease is to be in the usual form; details to be arranged hereafter.

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Pending the completion of this contract, it is mutually agreed that friendly arrangements shall be made as far as practicable.

Dated the fourth day of October, A. D. 1878.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,

By THOS. NICKERSON, *President.*

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY.

By JOS. NICKERSON, *President P. & A. V. R. R.*

DENVER AND RIO GRANDE RAILWAY COMPANY, 181

By SEBASTIAN B. SCHLESINGER,
By JAMES D. POTTS.

Subject to the approval of the President of the Denver and Rio Grande Railway.

EXHIBIT "C."

FORM OF LEASE DENVER AND RIO GRANDE RAILWAY COMPANY AND ATCHISON, TOPEKA AND SANTA FE RAILROAD.

This indenture, made this———day of October, A. D. 1878, between the Denver and Rio Grande Railway Company, a corporation duly organized and existing, owning and operating a railroad line in Colorado, party of the first part, and the Atchison, Topeka and Santa Fe Railroad Company, a corporation duly organized and existing under the laws of Kansas, party of the second part, witnesseth:

That, in consideration of the sum of one dollar, to it duly 182
paid by the party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of the rents, covenants and agreements,

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hereinafter reserved and contained, on the part and behalf of the party of the second part to be paid, kept, and performed, the party of the first part to these presents has granted, leased, and demised, and by these presents does grant, lease and demise unto the party of the second part, its successors and assigns, all and singular the railroad which the party of the first part has heretofore constructed and operated in Colo-

183 rado, commencing in the city of Denver and extending thence southwardly *via* Colorado Springs to Pueblo, on the Arkansas river; thence still in a southerly direction *via* Cucharas to El Moro, in Colorado, and to El Mora Collieries; and also from Cucharas westward *via* La Veta and Garland to Alamosa, on the Rio Grande del Norte; and also from Pueblo westward up the valley of the Arkansas river to Canon City and the Canon coal mines,—in all about three hundred and thirty-seven miles of railroad, more or less, exclusive of sidings;

184 together with lands and premises occupied by or connected therewith; together also with the rolling stock, equipment, and appurtenances to the railroad hereinbefore described, belonging or in any wise appertaining and owned or acquired by the party of the first part in connection therewith; also, all rights, privileges and franchises of the said party of the first part necessary to the operation and management of said hereinbefore described railroad or the business thereof; including in the said premises hereby demised all the railroads, ways, and rights of way; all the depot grounds, tracks, bridges, viaducts, culverts, fences, and other structures, de-

185 pots, station houses, engine houses, car and freight houses, and other buildings, machine shops and other shops, machinery and tools, and all other lands and property whatever belonging to the party of the first part, and which have heretofore been used or acquired for use in connection with the said hereby demised railroad or the business thereof.

Provided, however, that nothing herein contained shall operate to grant or demise, or be construed to include the

franchise to be a corporation heretofore conferred upon the said party of the first part or the corporators thereof, or any other right, privilege or franchise which is or may be necessary or requisite to preserve the corporate existence and organization of the party of the first part: and all such franchise to be a corporation, and all rights and privileges, other than those hereinbefore granted and demised, are hereby expressly reserved and exempted from these presents. 186

To have and to hold the said hereinbefore described railroad and premises with the appurtenances, unto the party of the second part, its successors and assigns, from the first day of December, 1878, for and during, and until the full end of, the term of thirty years thence next ensuing, and fully to be complete and ended, the said party of the second part, its successors and assigns, yielding and paying therefor unto the party of the first part, its successors and assigns, during the said term hereby granted, the rent hereinafter specified, and in the manner hereinafter provided, and keeping and performing all and singular the covenants and agreements hereinafter set forth, to be by the said party of the second part kept and performed, subject, nevertheless, to debts contracted by the party of the first part, whether the same shall be secured by mortgage lien or otherwise, howsoever or unsecured, not exceeding in the aggregate at the date of delivery of the demised premises the sum of twenty-two thousand six hundred and sixty-four dollars per mile of constructed road, including any liabilities of the party of the first part for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts up to the period of the delivery of the leased property to the party of the second part, or incurred uuder the administration of the company prior to such delivery; and which hereafter shall become debts, but exclusive of stock, and any excess of such debts and liabilities, exclusive of stock, of the party of the first part over and above said sum, said party of the first part agrees and guar- 187 188 189

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antees to pay or provide for. The party of the first part also covenants that the stock issued by it does not exceed eight million five hundred thousand dollars. And in consideration of the premises, the parties hereto have further covenanted, promised and agreed, and by these presents do covenant promise, and agree, each for itself and its successors and assigns, to and with the other party hereto, its successors and assigns, as follows, to wit:

ARTICLE I. The party of the second part shall and will, at its own proper cost and expense, and without deduction
190 from the rent hereinafter provided to be paid to the party of the first part, manage, operate, use, and run the said demised railroad and property at all times during said term in the same manner as the party of the first part, as the owner thereof, or otherwise, is now or shall or may at any time hereafter during said term be required by law to do; and using, operating, and running the same, the said party of the second part shall and will, at its own proper cost and expense, and without deduction from said rent, at all times during said term, maintain, preserve, and keep the said demised railroad and premises, fix-
191 tures and appurtenances, and every part and parcel thereof in thorough repair, working order and condition, and fully supplied with motive-power, rolling-stock and equipment, and make all needful and proper additions thereto and improvements thereon, so that the traffic and business of the said demised railroad, shall be preserved, encouraged and developed, and that the same shall be at all times done with safety and expedition, and the public be accommodated in respect thereto with all practicable conveniences and facilities, and that all future growth or increase of such traffic and business, as the same may arise or be reasonably anticipated, shall be fully
192 provided for and secured. And the party of the second part promises, covenants and agrees to meet the obligations of the party of the first part to the public by making from time to

time, and whenever needed or required, such repairs, renewals and replacements, additions and improvements, in manner and for the purposes aforesaid, and to make all reasonable efforts and use all lawful means to maintain and preserve, develop and increase all the business of said demised railroad.

ARTICLE II. The said party of the second part shall and will at all times during said term, at its own proper cost and expense, and without deduction from the rent aforesaid, em- 193
ploy all such officers, superintendents, employees and workmen, as shall be necessary to fully carry out the purpose of Article I.

ARTICLE III. The party of the second part, for itself, its successors and assigns, hereby covenants, promises and agrees to, and with the party of the first part, its successors and assigns, in consideration of the execution to it of this lease, that the said party of the second part shall and will, well and truly apply and pay, or cause to be paid in manner hereinafter provided, as and for rent of the herein demised property,

For the first year forty-three per centum,
For the second year forty-two per centum, 194
For the third year forty one per centum,
For the fourth year forty per centum,
For the fifth year thirty-nine per centum,
For the sixth year thirty-eight per centum,

For the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth years thirty-seven per centum, and for the sixteen remaining years of the term, thirty-six per centum of the total gross earnings of said demised railroad, and the business thereof, to be made up in the usual manner and as hereinafter provided; and it is further agreed that for the purpose of ascertaining and determining the amount of 195
gross earnings upon and from which the rent aforesaid shall be computed and paid, the following principles shall govern:

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whenever any passenger or freight shall be carried over the said demised railroad, or any part thereof, and also over the railroads of the party of the second part, or of the Pueblo and Arkansas Valley Railroad Company, built or to be built, or any part of either, said party of the first part shall be, for each mile of such transportation over the demised railroad, entitled to share in the distribution of fare and freight moneys, as if the same were carried one mile and a quarter, except that
196 transportation of business passing over that part of the hereby demised premises extending from Pueblo westward up the valley of the Arkansas river to Canon City, or any part thereof, and likewise over the line from Canon City to Leadville, shall only be reckoned mile for mile, it being the intention of this provision that the gross earnings from all business interchanged between said demised railroad, or any part thereof, and the railroads owned or controlled by the party of the second part, or by the Pueblo and Arkansas Valley Railroad Company, built or to be built, or any part of any of them, shall be divided on the basis of crediting each mile of trans-
197 portation over the hereby demised railroad, as one and one-quarter miles; except where such business shall be interchanged between the demised line connecting Pueblo with Canon City, and the road which may connect Canon City with Leadville, in which case the gross earnings thereof shall be divided *pro rata* according to the number of miles hauled over the respective roads.

The said party of the second part hereby covenants and agrees:

a. That neither the Atchison, Topeka and Santa Fe Railroad Company, nor the Pueblo and Arkansas Valley Railroad Company, nor any other company which either of them may now or hereafter control, shall directly or indirectly build,
198 or operate or encourage any line or track not already constructed, that may be parallel to or competing with any constructed Denver and Rio Grande line, or impair the earnings

or security thereof, nor lay a third rail, or alter the gauge of any part thereof (except between Pueblo and the coal mines east of Canon City) without at the same time widening the gauge or laying a third rail over all Denver and Rio Grande Railway lines.

But the foregoing section shall not be construed to mean that any line between Canon City and Leadville, or any extension beyond Leadville, is a competing line with any such constructed Denver and Rio Grande line.

And any line that may be built from any terminus of the 199
Denver and Rio Grande lines, or in extension thereof, shall be of three feet gauge.

b. That the line of transportation *via* Pueblo to and from Denver and the Missouri river, and all other points on any of the railroads owned, operated or controlled by the party of the second part, shall be kept open on equal terms with any other line or lines between Denver and such river or other points respectively for the carriage of freight and passengers, so as to enable the parties hereto to compete with any other line out of or into Denver, and that it will not make or enter into any agreement or understanding with any competing railroad for 200
any division of business, territory or earnings, which shall in any way tend to injure or diminish the business or earnings of the railroad hereby demised, without in some manner securing to the said railroad a proportionate benefit and advantage.

c. That where any traffic can be carried at the election of the lessees either over the railroad hereby demised or over some other of the railroads owned, controlled or managed by the said party of the second part, then and in all such cases it shall be transported by the shortest line; and generally that in all cases of traffic wherein the said party of the second part but for this agreement and the covenants herein 201
might be able or endeavor by fixing rates, or in any other manner, to divert business from the said hereby demised railroad or any part thereof, the said party of the second part shall

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not so divert or endeaver to divert any such business to the injury of said demised road, but an equitable division of such business shall be made between them ; and the local and other rates on the said demised road shall not be fixed or adjusted so as to impair or diminish the earnings thereof.

d. That the rates of freight on Canon coal to all points on the lines owned or controlled by the party of the second
202 part, east of the city of Pueblo, shall not be higher than on coal from Trinidad, or El Moro and vicinity, in southern Colorado, to the same point.

e. That the rates of transportation between the South Arkansas and Pueblo, or any point east or north of Pueblo, shall not be less than the rates on business between Alamosa and Pueblo, or said other points east or north of Pueblo.

The rent hereinbefore reserved shall be paid monthly, and it being provided herein that the term hereby granted shall begin on the first day of December, in the year eighteen hundred and seventy-eight, it is hereby further agreed and
203 declared that the rental provided to be paid as aforesaid shall commence to run on that day, and the installment for the first calendar month shall be payable on or before the last day of the calendar month next succeeding such first month, and thereafter such payments shall be made for each month on or before the last day of each succeeding month.

ARTICLE IV. That said party of the second part shall and will at all times during said term, keep insured to the same extent as its other leased similar property, the rolling stock, tools and machinery, buildings, bridges, or other structures
204 erected upon the premises hereby demised, and all other property usually insured by railroad companies, and shall and will from time to time, and as often as the same shall become due, also pay and discharge, without deduction from the rent aforesaid, any and all premiums for such insurance, and also any and all taxes, assessments, duties, imposts, and charges what-

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soever which shall or may be levied, assessed, or imposed during said term by any governmental or lawful authority whatsoever upon the said demised premises and railroad, or any part thereof, or upon any business or earnings or income of the same, or upon the party of the first part with respect 205
to the said railroad and premises, or any part thereof, or any business or earnings or income thereof, or upon the party of the first part for or in respect to any money which shall be paid or which shall become payable to the party of the first part as or on account of the rent hereinbefore reserved, or any money which shall be paid or become payable to the party of the first part in pursuance of these presents, or with respect to any interest or right under these presents or upon such money, interests, or rights, or which shall or may be hereafter assessed, or imposed upon the party of the first part upon the amount of its capital stock by or under any governmental authority which is or may be exercised 206
over any territorial jurisdiction within which any part of the said railroad or premises is or may be situated; it being the true intent and meaning of these presents, that all governmental charges upon the aforesaid property or the income to be therefrom derived, which may be imposed by or under any governmental authority capable of enforcing such charges against or on the said property, or the corporation owning or leasing the same, shall be paid and satisfied by the party of the second part, however the forms thereof may change during the term of these presents, but that the said party of the second part shall not become liable to pay any tax imposed upon 207
stockholders personally in respect to stock held by them, or dividends or income derived by them therefrom, which shall be collected from such stockholders personally, without the intervention or service of the party of the first part or any of its officers or agents. And the party of the second part shall and will also at all times during said term allow and pay to the party of the first part, and without deduction from the rent

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aforesaid, and as a part of the necessary expense of carrying on the business of said demised railroad, the cost of meeting
208 the coupons and dividends of the party of the first part whenever due, and of the transfer of its bonds and stocks and of issuing certificates therefor wherever such transfer and issue is made, and of preserving and maintaining its corporate organization. And it is further agreed that the party of the second part will pay the current expenses of the party of the first part in preserving its corporate existence, maintaining its general offices, and paying the salaries of its officers during the month of December, 1878, and until the adjustment and settlement of accounts and transactions up to and growing out of the transfer provided by this lease, and not exceeding in all ten thousand dollars.

209 ARTICLE V. The said party of the second part shall and will at all time during said term and the continuance of this lease, keep an office in the city of Pueblo, Colorado, which shall be open at all reasonable hours and times for the transaction of the business of the said demised railroad, and at such office, under the direction of an auditor to be appointed by the party of the first part, its successors or assigns, whose salary shall be paid by the party of the second part, its successors or assigns, as part of the operating expenses of said demised railroad, keep full, true and just accounts of any and all moneys
210 received, and business done upon said demised railroad, and the character thereof, and of all moneys paid, laid out and expended, and liabilities incurred in connection with the same, and also full statistical accounts similar to those now kept by the party of the first part. The accounts so to be kept as above provided shall clearly distinguish between all business done over, and all moneys received and disbursed or expended, or liabilities incurred in operating that part of the demised railroad extending from Pueblo westward to Canon City, and over the remainder of said demised railroad; and such account, and any and all accounts which shall or may be kept by

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the party of the second part, its successors or assigns, in relation to the said demised railroad, or the business thereof, or any part thereof, and vouchers relating thereto, shall at all reasonable times be open to the inspection and examination of the party of the first part, its successors or assigns, its or their duly authorized agent; and the said party of the second part shall, at its own proper cost, furnish monthly statements of the earnings and expenses of the said demised railroad and premises to the party of the first part, and annually, to-wit: on or before the first day of April in each year, during the continuance of this lease, furnish to the said party of the first part, its successors or assigns, a detailed statement, duly authenticated, of the earnings, income and receipts arising from said demised railroad and premises, during the year ending the thirty-first day of December last preceding the said first day of April; and also a detailed statement, similarly authenticated, of all expenditures made by the party of the second part upon the said demised railroad and premises, for repairs, renewals, replacements, additions, improvements thereto and thereon, and equipment thereof, specifying the purposes of any and all such expenditures, which statements so to be furnished, shall separately state and contain the earnings and income, operating expenses and other expenditures made for or on account of the said portion between Pueblo and Canon City, and the remainder of the said demised railroad. And the party of the second part shall also, at its own cost, furnish for the use of the party of the first part, from time to time, whenever necessary, any and all reports and statements which the said party of the first part is now or may be hereafter required to make or file under or by virtue of any law enacted by competent authority.

211 212 213

ARTICLE VI. The party of the second part shall and will, at all times during the term aforesaid, bear, pay and discharge, at its own proper cost and expense, and without

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deduction from the rent hereinbefore reserved, any and all expenses, costs, damages, liabilities, claims and demands whatsoever, which shall or may arise out of its possession, management or operation of the said demised railroad and premises, or any part thereof, or out of the business thereof, during the said term, and shall and will, at all times during the said term, hold, save, and keep harmless, and indemnify the said party of the firrt part, of, from and against any and all expenses of operating during said term, the railroad and
215 premises hereby demised, and all damages, liabilities, actions, causes of action, suits, claims, and demands for injuries to persons or property, or for causing the death of any person or thing, through accident, neglect, or default, during said term, or for breach of contract or wrong done or permitted by the said party of the second part, in the refusal to transport, or negligence in transporting, any person, property, or thing, or the loss, conversion, or non-delivery of any property which the said party of the second part shall have agreed or be bound to transport over the said demised railroad, or any part thereof, or which the said party of the first
216 part, as the owner of the said railroad hereby demised, or any part thereof, is or shall be under any legal obligation, by contract, public duty, or otherwise, to transport thereon, and of, from, and against any and all costs, damages, liabilities, actions, causes of action, suits, claims, and demands whatsoever, which shall or may arise out of or in respect to the management, operation, or business of the said demised railroad and premises, or any part thereof, by the party of the second part, during the term aforesaid. And the said party of the second part shall and will defend all suits which may be
217 brought against the party of the first part during the said term, in respect to any matter or thing arising out of the management or operation of the said demised railroad, or any part thereof, by the party of the second part, and indemnify and save harmless the party of the first part, of, from and

against any and all matters and things whatsoever, which might or could be a charge upon, or operate to reduce the rent hereinbefore reserved, arising out of the management of the demised premises by the party of the second part.

ARTICLE VII. Possession of the said demised railroad and premises shall be given by the party of the first part to the party of the second part on the second day of December, 218
in the year eighteen hundred and seventy-eight, and upon the delivery of such possession, the party of the first part shall transfer and deliver to the party of the second part, for use upon said demised railroad and premises, all machinery, tools, implements and furniture, fuel, material and all railroad supplies belonging to the party of the first part, which shall have been procured for the use of said railroad or any part thereof, and shall then remain on hand; *provided, however*, that said fuel, material and other railroad supplies shall, at the time of such transfer and delivery, be paid for by the party of the second part, in cash, at a price to be agreed upon by two per- 219
sons, one to be appointed by the president of each party hereto, and in case of their disagreement, by an umpire previously agreed upon by said presidents, whose decision shall be final. Such appraisement shall be made as soon as possible after the execution of these presents, and be evidenced by the certificate of said appraisers or the umpire, to be made and executed in duplicate, one to be delivered to each of the parties hereto. The appraisers or said umpire shall arrive as nearly as possible at the value of the property as it may be on the day of giving possession of the hereby demised property.

The sum agreed upon by the appraisers, or fixed by the 220
umpire in accordance with the foregoing provisions, shall be deposited by the party of the second part with Sebastian B. Schlesinger, as trustee, who shall hold the money deposited with him in trust, and shall at the time of the delivery of pos-

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session of the demised railroad hereunder to the party of the second part, and upon the surrender by the party of the first part of the certificate aforesaid, pay over to the party of the first part, or any person by it lawfully authorized to receive the same, the sum or price so agreed upon or fixed and certi-
221 fied; and the party of the first part covenants and agrees that such money shall be applied to the payment of any of its debts, exclusive of stock, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, as aforesaid.

And it is further mutually covenanted and agreed by and between the parties hereto, that the party of the first part shall at its own cost receive and collect all earnings, incomes, issues and profits of the said demised railroad and premises, or any part thereof, and claims and demands arising from the business and operation thereof prior to the said first day of December, 1878; *provided, however*, that if the party of the first part
222 shall so request, such collection and any payments which the party of the first part shall request to be made out of the same shall be made for the party of the first part by the agents of the party of the second part, so far as may be practicable in the ordinary course of their employment, without charge for the services of such agents.

ARTICLE VIII. And whereas, the said party of the first part has heretofore made and entered into certain contracts and agreements in relation to the business of the said demised railroad, including contracts for supplies and material, and for the use and purchase of rolling stock, and it is the intent and meaning of these presents that all contracts relating thereto
223 not hereinafter excepted shall be assumed and carried out by the party of the second part, and that the benefit thereof should inure to, and the liability therefor rest on, the party of the second part, in place and stead of the party of the first part; now, therefore, the said party of the first part sells, assigns, transfers, and sets over unto the party of the second

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part all the right, title, and interest of the party of the first part in and under all such contracts and agreements which shall have been made in relation to the business to be done on the said demised railroad, or any part thereof, or in respect to the furnishing of any supplies and material not hereinbefore 224
specifically transferred, and the use and purchase of rolling stock; and the party of the second part hereby assumes the performance of the same on the part and behalf of the said party of the first part, according to the true intent and meaning thereof; but nothing herein contained shall apply after December 31, 1878, to any traffic contract made by said party of the first part with any connecting railroad companies, unless with a road included in this lease, nor to any other contracts than such as have been made reasonably and in good faith in the course of the business of the said party of the first part; and the said party of the second part hereby promises, covenants and agrees to and with the said party of the first part, 225
that the said party of the second part shall and will at all times hereafter save and keep harmless and indemnified the party of the first part, its successors or assigns, of, from, and against all costs, damages, expenses, liabilities, claims, and demands whatever, which shall or may arise under said contracts and agreements, or either thereof, by reason of any act or omission of the party of the second part; but the party of the second part is in no event to be liable for supplies or material except such as shall be actually delivered to it under such contracts, nor for rent of rolling stock, except such as accrues for use 226
after taking possession, and in no case shall the party of the second part be obliged to assume any contract for the construction of any extension.

ARTICLE IX. The said party of the first part hereby promises and agrees that as and when the several sums of money hereinbefore provided to be paid for rent under Article III shall be paid to and accepted by the party of the first part

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the same shall immediately be deposited with the United States Trust or other trust company in New York city, in trust for the payment of interest on the debts of the party of the first part, going to make up the sum of twenty-two thousand
227 six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made; and if any surplus thereafter remains, such surplus shall be applied first to the payment of such debts and liabilities, other than its present mortgage bonds, as are mentioned in the habendum clause of this agreement, going to make up the sum of twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of stock, subject to which this lease is made, but not including the excess of such debt and liabilities which the party of the first part has hereinbefore agreed to pay or provide for, until such
228 debts and liabilities shall be fully paid and satisfied, and thereafter to the redemption and cancellation of its first mortgage bonds at the lowest market price, to be ascertained by advertising for bids, but at a price not exceeding ten per cent. above par; and in case said bonds cannot be purchased at said last named price, after reasonable advertising, such surplus shall be paid over to the party of the first part to be applied to payment of dividends to its stockholders. The party of the first part also agrees, on or before the first day of February next, to deposit in such trust company an amount which, with the
229 interest allowed by said trust company to May 1, 1879, shall be equal to one-twelfth of the annual interest on its debt of twenty-two thousand six hundred and sixty-four dollars per mile, to be appropriated towards the payment of such interest.

ARTICLE X. In case the said party of the second part, its successors or assigns, shall at any time or times hereafter, during the term aforesaid, fail or omit to pay the rent hereinbefore mentioned or provided to be paid by the party of the second part, or any part of such rent, when the same shall have become payable as hereinbefore specified, or in case the party of

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the second part, its successors or assigns, shall fail or omit to fully keep and perform the covenants and agreements herein contained, or any of them, and shall continue in default in re- 230
spect to the payment of such rent or the performance of such covenants and agreements, for the period of ninety days, then in either and every such case it shall be lawful for the party of the first part, its successors or assigns, at its or their own option, and without notice to the party of the second part, to enter into and upon the railroad and premises hereinbefore demised, and each and every part thereof, and remove all persons therefrom, and from thenceforth the said demised railroad and premises, with the equipment and appurtenances thereof, and all additions and improvements which shall have 231
been made to the same, except so far as such additions and improvements shall belong to the party of the second part under Article II, to have, hold possess, and enjoy, as of the first or former estate of the said party of the first part in the said demised premises; and upon such entry for non-payment of rent or breach of non-performance of any covenant or agreement herein contained, to be by the said party of the second part observed or performed, all the estate, right, title, interest, property, possession, claim, and demand whatsoever of the party of the second part, its successors or assigns, in and to the said demised railroad and premises, or any part thereof, 232
obtained in, under, or by virtue of this lease, shall wholly and absolutely cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And in case of such re-entry as aforesaid, the rent hereinbefore provided, and the several installments thereof, shall be apportioned from the time from which the last preceding payment of such installment was made up to the time of such re-entry, and such portion thereof as would have been payable in respect to the intervening time, if the whole period in respect to which such installment was payable had elapsed, 233
shall be deemed and taken to be due and payable, and the said

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party of the second part shall pay the same. And it is further declared and agreed that such re-entry shall not waive or prejudice any claim or right of the party of the first part to or for damages against the party of the second part on account of such non-payment of rent, or the non-performance or breach of the terms of this lease; and all such claims and demands and rights thereto are hereby expressly preserved to the party of the first part.

ARTICLE XI. And the said party of the second part
234 hereby covenants, promises and agrees, to and with the said party of the first part, that upon the expiration and at the end of the said term, or other sooner determination of this lease, the said party of the second part shall and will redeliver and surrender to the party of the first part, its successors or assigns, the said demised railroad and premises in as good order and condition as the same shall be delivered to the party of the second part under this lease, with such additions, betterments, and improvements as shall have been made thereto, and also all rolling stock, equipment, and other property delivered
235 under this lease in as good order and condition as its reasonable use and wear, proper repairs and replacements thereof being made from time to time, will permit; or rolling-stock, equipment, and other similar property, equivalent in character, amount, and condition thereto. And it is further mutually agreed that all the rolling-stock, equipment, machinery, tools, implements, and furniture and other similar property, which the party of the first part shall at the time of delivering possession of the said demised railroad and premises, as hereinbefore provided, transfer and deliver to the party of the second part for use upon or in connection with said demised railroad
236 and premises, shall be scheduled and valued, and all rolling-stock, equipment, machinery, tools, implements, furniture, and other similar property which the party of the second part, its successors or assigns, shall, upon the expiration and at the

end of said term, or other sooner determination of this lease, redeliver and surrender to the party of the first part, its successors and assigns, shall likewise be scheduled and valued, by two persons, one to be selected by each of the respective parties, its, his, or their duly authorized officer or agent; and in case of disagreement of the persons so appointed, by an umpire previously to be selected by said parties or their duly 237
authorized officer or agent, and that the decision of such umpire shall be final; and all rolling-stock, equipment, machinery, tools, implements, furniture, and other similar property used upon or in connection with said demised railroad and premises by the party of the second part, in excess of what shall be required by the terms hereof to keep good and replace similar property of the party of the first part, shall belong to the said party of the second part, and said appraisers or said umpire shall have power to make division and apportionment of all such property; and the party of the first part may at its option purchase whatever of such property shall be 238
allotted to the party of the second part, at a price to be determined by said appraisers or said umpire. And in any such division any equipment acquired by payments of installments shall belong to the several parties in proportion to the amounts severally paid therefor by each party. It is further agreed, inasmuch as this lease is made upon the understanding that the railroad of the party of the first part shall be on the second day of December, 1878, in thorough running order and condition, that in case the party of the second part shall claim that it is not in such order and condition at that date, the question whether it is so or otherwise, and if otherwise, what 239
amount is required to be expended by said party of the second part to put it in such order and condition, shall be determined by appraisers or an umpire to be appointed as above provided; and the amount so determined shall be expended by said party of the second part, and shall be allowed to said party in the adjustment and settlement to be made at the end of the term or the earlier determination thereof.

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ARTICLE XII. The said party of the first part hereby covenants, promises, and agrees to and with the said party of the second part, its successors and assigns, that it, the said
240 party of the first part, its successors and assigns, shall and will at any time or times hereafter and whenever thereunto requested by the party of the second part, its successors or assigns, execute, acknowledge, and deliver to the said party of the second part, its successors and assigns, at the proper cost and expense of the party of the second part, its successors and assigns, any and all such other and further instruments and assurances in the law for the better demising and leasing of the said railroad and premises to the said party of the second part, its successors and assigns, upon and subject to all
241 and singular the rents, covenants, agreements, and conditions hereinbefore reserved and mentioned as by the party of the second part, or its successors or assigns, or by its or their counsel learned in the law shall be reasonably advised, devised or required, provided that at the time of such request, the said party of the second part, its successors or assigns, shall not be in default in respect to the payment of any rent or other moneys hereinbefore agreed to be paid by it, or in default in respect to any of the covenants and agreements hereinbefore contained, to be kept and performed on its behalf; and said party of the second part covenants, promises and
242 agrees to and with the party of the first part, its successors and assigns, that the said party of the second part, its successors and assigns, shall and will at any time or times hereafter and whenever thereto requested by the party of the first part, its successors or assings, execute, acknowledge, and deliver any and all instruments for the more effectually assuring the payment of the rent hereinbefore reserved or agreed to be paid, and the application of such rent money to and for the purposes herein set forth, and the performance of the promises and agreements hereinbefore set forth on behalf of the party of the second part to be kept and performed, as by the said

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party of the first, its successors or assigns, or by its or their 243
counsel learned in the law should be reasonably advised, devised, and required.

ARTICLE XIII. None of the provisions of this lease shall be abrogated or modified unless with the formal written consent of the trustees of the present mortgages of the party of the first part, or by the holders duly evidenced as such, owning or legally representing not less than two millions dollars of the bonds issued thereunder.

In testimony whereof the said corporations, parties hereto, have caused these presents to be signed by their respective presidents thereto duly authorized, and their corporate seals to be hereto affixed the day and year first above written.

Filed 20 January, 1879. 244

EXHIBIT "D."

This agreement, made and entered into this nineteenth day of October, 1878, witnesseth: That William J. Palmer, of Colorado, party of the first part, and Alden Speare, of Boston, Massachusetts, party of the second part, in consideration of the mutual covenants and agreements hereinafter contained, have agreed, and hereby do agree, as follows:

On or before the first day of December, 1878, there shall be deposited with T. Jefferson Coolidge, Esquire, also of Boston, as trustee hereunder, by the party of the first part, or on his behalf, forty-two thousand five hundred and ten shares, of 245
one hundred dollars each, in the non-assessable capital stock of the Denver and Rio Grande Railway Company, being a majority of said stock; and within ten days after the party of the first part shall have deposited in the postoffice at the city of New York, properly enveloped and addressed to the party of the second part at Boston, Mass., with the postage prepaid thereon, a notice in writing, there shall likewise be deposited with said trustee by the party of the second part, or on his be-

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half, eight thousand five hundred and two shares, of one hun-
246 dred dollars each, in the non-assessable capital stock of the Pueblo and Arkansas Valley Railroad Company, being at the rate of one share in the said stock of the last named company for each five shares of the said stock of the Denver and Rio Grande Railway Company, so deposited by the said party of the first part. If either party fail, this agreement to be void; and the party not in default shall be entitled upon demand to the redelivery to him of the shares he shall have deposited as aforesaid, in conformity hereto. But, if neither party shall fail, then the said trustee shall have and hold said shares so deposited with him by the said parties, respectively, in trust,
247 and dispose thereof as hereinafter provided.

The said trustee shall hand over and deliver to said party of the first part for each five shares in the capital stock of the Denver and Rio Grande Railway Company so deposited, one share in the said stock of the Pueblo and Arkansas Valley Railroad Company, to have and to hold the same as his, the party of the first part's property, free and discharged of and from all claims and demands of the said party of the second part or any other person or persons, party or parties, whomsoever thereon or thereto, or on or to any part thereof; provided, however, that until the said party of the first part shall fur-
248 nish proof satisfactory to said trustee that all debts, including any liabilities of the said Denver and Rio Grande Railway Company for damages to persons or property carried or injured, or for salaries or non-fulfilment of contracts up to the period of the delivery by the Denver and Rio Grande Railway Company, of certain property described in a certain lease of the Denver and Rio Grande Railway Company, bearing even date herewith, to the Atchison, Topeka and Santa Fe Railroad Company, or incurred under the administration of the said Denver and Rio Grande Railway Company prior to such delivery and which hereafter become debts, in excess of the sum
249 of twenty-two thousand six hundred and sixty-four dollars per

mile of its constructed road, shall have been either paid, or payment thereof secured in a manner to be approved by said trustee, the said trustee shall retain from the said shares of the Pueblo and Arkansas Valley Railroad Company's stock, which would otherwise be deliverable to the party of the first part hereunder, not exceeding five thousand shares, but as and when the said debt shall be paid, or payment thereof secured in a manner to be approved by said trustee, the trustee shall hand over and deliver to the party of the first part as many of 250
the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock so retained as may be reasonably proportionate to the amount of such debt so paid or secured, and upon being satisfied that all said debts of said Denver and Rio Grande Railway Company shall have been paid or payment thereof secured in a manner satisfactory to him, said trustee shall hand over and deliver to the party of the first part the remainder of the said five thousand shares of the Pueblo and Arkansas Valley Railroad Company's stock retained as aforesaid.

I. Whenever, within one year from the date on which the Denver and Rio Grande Railway Company shall deliver 251
possession under said lease to the Atchison, Topeka and Santa Fe Railroad Company, the said party of the first part shall offer to deposit with said trustee a further number or additional shares of the stock of the Denver and Rio Grande Railway Company, then the party of the second part should and will, from time to time, and as required, deposit with said trustee such additional or further amount of said shares in the capital stock of the said Pueblo and Arkansas Valley Railroad Company as he may deem proper, not, however, less than sufficient to deliver to the party of the first part one share in the 252
said Pueblo and Arkansas Valley Railroad Company's stock for every five shares in the said Denver and Rio Grande Railway Company's stock so offered by the party of the first part; which stock so to be deposited by the party of the second part

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shall by said trustee be delivered to the party of the first part whenever he shall deposit with said trustee any such further or additional shares in the capital stock of said Denver and Rio Grande Railway Company, at the rate of one share of the stock of the said Pueblo and Arkansas Valley Railroad Company for each five shares of the stock of said Denver and Rio
253 Grande Railway Company, until all the stock of said last named company, now amounting to eight million five hundred thousand dollars par value, or eighty-five thousand shares (inclusive of the shares to be deposited under paragraph I.) shall have been deposited by the party of the first part; provided, however, that if the party of the first part shall, at or before the expiration of said year. have deposited or offered to deposit, with said trustee, sixty-three thousand seven hundred and fifty shares of said stock of the Denver and Rio Grande Railway Company, the period of one year hereinbefore limited,
254 shall, at the option of the party of the first part, by notice in writing, to be delivered to said trustee, be extended for a period not exceeding one additional year.

The said trustee shall have and hold the legal title to all the Denver and Rio Grande Railway Company's stock deposited with him by the party of the first part, and shall vote upon the said stock as directed by the party of the second part.

Whereas, the Denver and Rio Grande Railway Company has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease and demise its constructed road to the Atchison, Topeka and
255 Santa Fe Railroad Company, and whereas, such lease and this agreement are parts of the plan whereby the constructed railroad of the Denver and Rio Grande Railway Company and its stock, should be controlled in the interest of the Atchison, Topeka and Santa Fe Railroad Company, and corporations whose roads are leased or otherwise controlled by it, and the present stockholders of the said Denver and Rio Grande

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Railway Company, or their assigns, receive full paid non-assessable stock of the Pueblo and Arkansas Valley Railroad Company, in lieu of and on surrendering the shares of the Denver and Rio Grande Railway Company's stock, held by 256
him or them respectively, at the rate aforesaid, which rate is based on the assumption that the indebtedness of said companies respectively, exclusive of stock, does not exceed a certain sum per mile of constructed road, and the said Denver and Rio Grande Railway Company has guaranteed to pay or secure the payment of its debts in excess of ($22,664) twenty-two thousand six hundred and sixty-four dollars per mile, exclusive of the stock in furtherance of the plan. Now, for the purpose of enabling said William J. Palmer to collect from each holder of the Denver and Rio Grande Railway Com- 257
pany's stock a proportionate share of said excess, the party of the second part further covenants and agrees that the entire interchange of stocks shall be made by the parties hereto, and through the intervention of said trustee, and as herein provided and not otherwise howsoever; provided that nothing herein contained shall be deemed to authorize the party of the first part by pursuing the remedies herein provided, or other remedies to compel such interchange after the period of one year, or if such period be extended as aforesaid, after the expiration of such extension.

It is further agreed that whatever assets the said Denver 258
and Rio Grande Railway Company may have outside said demised railroad and premises, at the time of surrendering possession thereof to the Atchison, Topeka and Santa Fe Railroad Company, or accruing to it afterwards, on account of the administration of its business, before such date, shall be well and truly applied towards the payment of such debts of said company (in excess of the said sum of twenty-two thousand six hundred and sixty-four dollars per mile), as the party of the first part may direct, and in such manner as he may direct; and that the trustee hereunder, or the person to whom the

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259 trustee may hereafter transfer and assign the stock which shall be deposited with him by said party of the first part, shall at all times and whenever requested, aid and assist with his or their vote on such stock, or otherwise howsoever in carrying out this provision.

It is further agreed that, inasmuch as part of the debt of the Denver and Rio Grande Railway Company in excess of twenty-two thousand six hundred and sixty-four dollars per mile, has been incurred for work done and material expended for extending its line; that such work done and material expended forms part of the assets aforesaid; and that whenever
260 any such work or materials shall be used, or taken possession of, or otherwise accrue to the benefit of the Atchison, Topeka and Santa Fe Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, or any corporation whose road is or shall be leased or controlled by it, the Atchison, Topeka and Santa Fe Railroad Company, the value of such work and material so used and taken possession of, or otherwise accruing to the benefit of the Atchison, Topeka and Santa Fe Railroad, or other corporation as aforesaid, shall be appraised by two persons, one to be appointed by the president of the
261 Atchison, Topeka and Santa Fe Railroad Company, and the other by the party of the first part; or, in case such persons shall disagree, by an umpire to be appointed by the said president and the party of the first part, and the decison of such umpire shalll be final; and the party of the second part promises and agrees on demand to pay to the party of the first part the amount or amounts so agreed upon or fixed by said umpire, and that, failing to pay the same on such demand, such amount or amounts s all be held to reduce the debt of the Denver and Rio Grande Railway Company, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, *pro tanto*, and the trustee hereunder shall deliver to the
262 party of the first part a proportionate number of the five thousand shares in the Pueblo and Arkansas Valley Railroad

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Company's stock, which he shall have retained as aforesaid; but the party of the first part covenants that on receiving such amount or amounts from the party of the second part, he shall and will well and truly apply the same to the reduction of the said debt in excess of twenty-two thousand six hundred and sixty-four dollars per mile. It is further agreed, inasmuch as the debts of the Denver and Rio Grande Railway Company, in excess of twenty-two thousand six hundred and sixty-four 263
dollars per mile, include any liabilities of the Denver and Rio Grande Railway Company for damages to persons or property, carried, or salaries, or non-fulfilment of contracts, up to the period of the delivery of the leased property to the Atchison, Topeka and Santa Fe Railroad Company, or incurred under the administration of the company, prior to such delivery, and which hereafter shall become debts, that the party of the first part shall have the rightful power and authority to defend in the name of the Denver and Rio Grande Railway Company, but at his own proper cost and expense, any suit, action, 264
or other legal proceeding which shall or may be brought or pending, to enforce such liability; and that if the power and authority hereby granted shall be insufficient, the board of directors, or other duly authorized officers of said company, for the time being, shall, on the written request of the party of the first part, grant and confer such power and authority on the party of the first part, without any delay or condition imposed. It is understood that this agreement is to bind the party of the second part as the legal holder of the Pueblo and Arkansas Valley Railroad Company's stock hereinbefore referred to as a representative of all persons or 265
parties having or lawfully claiming to have a beneficial interest in such stock, that any liability however arising from the breach of any covenant, or the non-performance of any act on behalf of the party of the second part, may be enforced against him individually; and in case said party of the second part shall die, or become incapable by disease to per-

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form his part of this agreement, its provisions shall be carried out by Isaac T. Burr; that in case the party of the second part shall die or become incapable to act, the rights and privileges to him herein granted, and obligations to be performed by him, shall be exercised by William A. Bell, of Colorado.

266 In case of any failure on the part of the party of the second part to deliver to said trustee the Pueblo and Arkansas Valley Railroad Company's stock, or any part therof (over and above eight thousand five hundred shares), when and as provided in this agreement, the said trustee shall, if he then holds any Denver and Rio Grande Railway Company's stock, and otherwise the said party of the second part shall transfer and deliver to the party of the first part ten shares of Denver and Rio Grande Railway Company's stock as penalty for each share of Pueblo and Arkansas Valley stock he may
267 fail to so deliver, and there shall be the same penalty for each share of Pueblo and Arkansas Valley Railroad Company's stock that may be exchanged for stock of the Denver and Rio Grande Railway Company's by the Pueblo and Arkansas Valley Railway Company's, or by the Atchison, Topeka and Santa Fe Railroad Company, or by any party or company directly or indirectly acting for them or either of them during the periods herein provided, except the same shall be made by the parties hereto through the trustee.

The party of the second part covenants not to part with any of the Denver and Rio Grande Railway Company's stocks
268 delivered to him under this agreement until December 2, 1879, or if the time be extended as provided herein, until December 2, 1880; provided that nothing herein contained shall be held to prevent the delivery to the party of the first part of any shares of said stock provided to be delivered to him as penalty.

And the said party of the second part covenants and guarantees that the debt of the Pueblo and Arkansas Valley Railroad Company does not exceed, exclusive of stock, eleven thousand seven hundred and eighty dollars per mile; and in case the total debt of that company shall exceed that sum the party of the second part promises and agrees that he shall and will deposit with said trustee so many shares of non-assessable stock of the last named company, in addition to the 269
shares hereinbefore agreed to be deposited by him as shall enable the trustee to deliver to the party of the first part on account of stock then already deposited by him or which he may thereafter deposit, an additional amount of said Pueblo and Arkansas Valley Railroad Company's stock for each five shares the party of the first part shall then have deposited, or thereafter deposit, in the same proportion as the excess may bear to the amount of debt aforesaid; and, if default be made in such deposit or delivery, the party of the first part shall have the right to demand from said trustee and of the party of the second part the return of a proportionate number of shares of 270
the Denver and Rio Grande Railway Company's stock, which upon such demand shall be delivered to him by the trustee, or the party of the second part, as the case may be.

It is further agreed, that in case any disputes shall arise between the parties hereto, the said trustee shall act as umpire; but, if a dispute or difference arises between the parties, or either of them, and the said trustee, the party who shall claim his rights to be affected by such dispute, and the trustee, shall each appoint a referee, and the referees so appointed shall select another person who shall act as umpire, and the decision of any umpire appointed hereunder shall be final; and the 271
parties and said trustee shall be bound to conform their action respectively to such decision.

It is further understood, that "debts of the Denver and Rio Grande Railway Company, in excess of twenty-two thou-

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sand six hundred and sixty-four dollars per mile" are exclusive of its stock.

Signed, sealed and delivered
in presence of

THEODORE F. H. MEYER.

WM. J. PALMER.
ALDEN SPEARE.

EXHIBIT "E.'

ESCROW AGREEMENT.

This memorandum of agreement, made the nineteenth day of October, 1878, witnesseth:

Whereas, the Denver and Rio Grande Railway Company
272 has made and executed a certain instrument in writing, bearing even date herewith, whereby it undertakes to grant, lease, and demise to the Atchison, Topeka and Santa Fe Railroad Company, all that certain railroad (337 miles, more or less, exclusive of sidings), and other property therein more particularly described, in consideration of a certain rent therein reserved, and certain covenants, promises and agreements therein contained, by the said Atchison, Topeka and Santa Fe Railroad Company, to be paid, kept and performed, as thereby, reference being thereunto had, will more fully appear, and the said Denver and Rio Grande Railway Company thereby agrees to
273 pay or provide for all its debts incurred up to the time of delivery of possession thereunder, in excess of twenty-two thousand six hundred and sixty-four dollars per mile, and the said Atchison, Topeka and Santa Fe Railroad Company has agreed to and accepted the terms of such lease in form and in substance, and in evidence thereof has likewise executed a counterpart of said instrument, and whereas, it is in and by said instrument provided, that possession of the demised rail-

way property should be surrendered and delivered by the said lessor company to the said lessee company, and the term thereby granted is to commence on the second day of December, eighteen hundred and seventy-eight. 274

Now this memorandum witnesseth, that the parties to said instruments or leases have agreed that the same so executed shall be deposited with S. B. Schlesinger, in Boston, in escrow pending the performance, by the several parties hereinafter named, of the acts to be done and performed by them respectively. Whereas it is necessary and advisable, in order to make such lease binding and effectual, that the same, and the terms thereof, should be ratified and confirmed by the stockholders of the lessor company and the directors of the lessee company, parties thereto. 275

I. Pending the ratification thereof by the stockholders or directors of said companies respectively.

And whereas, in and by said lease the said Atchison, Topeka and Santa Fe Railroad Company has agreed to pay in cash for the fuel, material and supplies on hand at the time of delivery of possession of the demised property to it, at a price to be determined as in said lease provided, and it is intended that the money so to be paid is to be applied towards paying or providing for the said debt of the lessor company in excess of the amount of twenty-two thousand six hundred and sixty-four dollars per mile aforesaid.

II. Pending the deposit by the said Atchison, Topeka and Santa Fe Railroad Company with S. B. Schlesinger, as trustee, of the money so to to be agreed by it. 276

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And whereas, it is also intended as part of the entire plan that the capital stock of the Denver and Rio Grande Railway Company, consisting of eighty-five thousand shares of one hundred dollars each, shall to the extent practicable, be controlled in the interest of the Pueblo and Arkansas Valley Railroad Company, and to that end William J. Palmer and Alden Speare have agreed substantially as follows:—

277 That the said William J. Palmer shall, on or before the first day of December, eighteen hundred and seventy-eight, deposit forty-two thousand five hundred and ten shares of the capital stock of the Denver and Rio Grande Railway Company with T. Jefferson Coolidge, as trustee, and that the said Alden Speare shall likewise, on or before that day, deposit with said trustee eight thousand five hundred and two shares of one hundred dollars each in the full paid stock of the Pueblo and Arkansas Valley Railroad Company.

III. Pending the deposit of said shares by said parties, respectively, on the second day of December, 1878, if by that time.

I. Said lease shall have been ratified as aforsaid.

278 II. And the Atchison, Topeka and Santa Fe Railroad Company shall have deposited said moneys.

III. And the said William J. Palmer and Alden Speare shall respectively have deposited said shares
the said S. B. Schlesinger, trustee, shall deliver to each of said companies the instrument executed by the other under such

other company's seal; but if, prior to said second day of December, 1878, the said lease shall not have been ratified by the stockholders of the lessor company and the directors of the lessee company, or either of them; or the said Atchison, Topeka and Santa Fe Railroad Company shall not have de- 279
posited the said money; or the said William J. Palmer and Alden Speare, or either of them, shall not respectively have deposited the said shares, the said S. B. Schlesinger shall continue to hold the said instruments in escrow, pending the performance, by the party or parties in default, of the act or thing by such party or parties respectively required to be performed; and thereupon immediately after the party or parties in default shall have done and performed the act of such party or parties respectively required, the said S. B. Schlesinger shall deliver such instruments as aforesaid, and when delivered in accordance herewith, the said instruments shall thereupon im- 280
mediately become and be of full force and effect from and after such delivery; but at the time said trustee shall deliver said instruments, he shall likewise pay over to the Denver and Rio Grande Railway Company, or any person by it authorized to receive the same, the money which the said Atchison, Topeka and Santa Fe Railroad Company shall have deposited with him as the price or value of the fuel, material and railroad supplies on hand at the time of such delivery, to be applied to reduction of the debts of Denver and Rio Grande Railway Company, in excess of $22,664 per mile, it being the 281
true intent and meaning of these presents, that ratification by the stockholders of the Denver and Rio Grande Railway Company, and by the directors of the Atchison, Topeka and Santa Fe Railroad Company, of the lease as aforesaid, the deposit of the money by the said Atchison, Topeka and Santa Fe Railroad Company, the deposit of said shares by William J. Palmer and Alden Speare respectively, are all parts of one transaction, and that the lease shall have no validity unless the parties named shall severally do and perform their

respective parts, but that sufficient time shall be afforded them to do so.

282 [Signed.] THE DENVER AND RIO GRANDE RAILWAY COMPANY,
BY WM. J. PALMER,

[Signed.] THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,
BY THOS. NICKERSON.

Signed in presence of
[Signed.] THEODORE V. H MEYER.

(endorsed)

No. 155.

IN THE
CIRCUIT COURT
OF THE
UNITED STATES.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY,

Supplemental Bill, and Exhibits.

ENDORSED:
Filed May 24, 1879.
(*Signed*) EDWARD F. BISHOP,
Clerk.

And afterwards and on to-wit the 22d day of June, A. D. 1879, came the said complainant by Corydon Beckwith, Esq., its solicitor, and filed in said Court in said cause its supple-
283 mental petition, in words and figures as follows, to-wit:—

SUPPLEMENTAL PETITION.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO,

Northern Division.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

vs.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY.

To the Honorable Judges of said Court:—

Your petitioner, the Pueblo and Arkansas Valley Railroad Company, respectfully shows unto your Honors that since the granting of the injunction in favor of your petitioner in the above-entitled cause, your petitioner has constructed a railway from Canon City to the twentieth mile post, mentioned in the proceedings in said cause, and said road is now in condition to be operated by the running of engines and cars 284
thereon; that a bridge on a portion of the line of said road lacks a permanent superstructure of iron to replace the temporary superstructure now used thereon; the iron superstructure which has been procured by your petitioner, is ready to be put into place; the entire cost of building the said road, including the cost of the said iron superstructure of said bridge, and of putting the same in place will be four hundred thousand dollars and five hundred thoussnd dollars.

Your petitioner further represents unto your Honors that the said road is constructed upon the north side of the Arkan- 285
sas river; and that a road equally good, substantial and useful may be constructed upon the south side of the river, excepting perhaps for about a mile and a quarter, through the Royal Gorge, at a cost not exceeding one hundred dollars more than

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the cost of the construction of said road on the north side of said river.

Your petitioner further shows unto your Honors that it is ready and willing to pay to the plaintiff the cost of constructing
286 a road on the south side of the river, when the same shall be constructed, over and above the cost of constructing a road upon the north side of the river, provided it shall be ultimately decided that plaintiff has the prior right of way on the north side of the river.

Your petitioner further shows unto your Honors that it will require one year to construct a road on the south side of the river; that your petitioner, in order to accommodate the public, has occasion to use the said railroad from Canon City to the twentieth mile post, from day to day, and it submits that if
287 it is required to construct its road on the south side of the river, it ought to be allowed a reasonable time so to do before it is required to surrender the right to use the said railroad on the north side of the river, upon paying reasonable compensation for such use.

Your petitioner further shows that said railroad from Canon City to the twentieth mile post was constructed by your petitioner and its predecessors in good faith, and that if said plaintiff takes said road, your petitioner ought to be paid the cost of constructing the same; that the plaintiff is totally in-
288 solvent; and such payment ought to be made before possession thereof is required to be delivered by your petitioner.

Your petitioner further shows unto your Honors that it is impracticable for two roads to be constructed on a portion of said line, to-wit: through the Royal Gorge, a distance of about six thousand feet; and that, if the two companies were to use the same track on said portion of the line, such use ought to be made and had under proper rules and regulations, to be prescribed by the court, defining the rights of the parties rela-

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tive to such use, and that such rules and regulations are necessary for the safe and proper use of the same. 289

Your petitioner therefore prays that an inquiry made in such manner as your honors shall direct relative to the feasibility of constructing and operating railroad on the south side of the Arkansas river, between Canon City and the twentieth mile post, together with the cost thereof; also the cost of constructing a road on the north side of said river, and the difference in cost between the construction, feasibility, and operation of railroad on the respective sides of the said river, and that further inquiry be made relative to the extent of said 290
line necessary to be used jointly by the plaintiff and your petitioner in operating and running engines and cars upon said line, and relative to proper rules and regulations relative to the use of the same, together with the compensation to be paid by the one party to the other party for the use thereof, and the expenses of such use and of maintaining the same, and that a further inquiry may be made relative to the extent of time required to construct a road on the south side of said river, and
the terms that one party should pay to the other for the use of 291
the road already constructed, until the road on the south side of the river shall be constructed, and that your petitioner may have leave to incorporate the matters and things hereinbefore stated in the supplemental bill heretofore filed by your petitioner in said cause, or that your petitioner may have such relief herein as equity and good conscience may require.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,

BY WM. B. STRONG, *Gen'l Manager.*

C. BECKWITH,
G. B. REED,
WILLARD TELLER,
CHAS. E. GAST.
L. G. PRATT,
} *Solicitors for Petitioner.*

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292 UNITED STATES OF AMERICA. } ss.
District of Colorado. }

I, William B. Strong, being duly sworn, testify and say that I am the general manager of the Pueblo and Arkansas Valley Railroad Company, the petitioner in the foregoing petition, and as such have authority to file the said petition; that I have read the foregoing petition, and know the contents thereof; and that the matters and things therein stated are true, and that as such general manager of the petitioner, I have a more intimate knowledge of the matters and things stated in
293 said petition than any other officer of said company.

WM. B. STRONG.

Subscribed and sworn to before me this 23d day of June, A. D. 1879.

JAMES M. LOWERY,
Notary Public.

[NOTARIAL SEAL.]

(endorsed)

155.

U. S. CIRCUIT COURT,
DISTRICT OF COLORADO.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,

SUPPLEMENTAL PETITION.

Filed June 22, 1879.
EDWARD F. BISHOP,
Clerk.

C. BECKWITH,
Solicitor for P. & A. V. Co.

And afterwards and on to-wit the 26th day of June, A. D. 1879, came the said complainant by C. Beckwith, Esq., its solicitor, and filed in said Court and in said cause its Supplemental Bill No. 2, and the said Supplemental Bill is in words
294 and figures as follows, to-wit:—

SUPPLEMENTAL BILL, No. 2.

IN THE UNITED STATES CIRCUIT COURT,

FOR THE DISTRICT OF COLORADO.

To the Honorable Judges of the Circuit Court of the United States, for the District of Colorado :—

The Pueblo and Arkansas Valley Railroad Company, a corporation organized and existing under laws of the State of Colorado, and a citizen thereof, brings this, its supplemental bill of complaint, by leave of court first had and obtained, against the Denver and Rio Grande Railway Company, a corporation organized and existing under the laws of the State of Colorado, and a citizen thereof, and thereupon your orator, by way of supplement, complains and says : 295

That the Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, heretofore, to-wit : On the fifteenth day of November, 1875, by an indenture of that date, demised to the Atchison, Topeka and Santa Fe Railroad Company, a corporation organized and existing under the laws of the State of Kansas, the whole of the railroad of the said Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, then or which might thereafter be located and thereafter to be built and constructed by the Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, from the western terminus of the railroad of the Atchi- 296
son, Topeka and Santa Fe Railroad Company, at the west line of the State of Kansas up the Arkansas Valley to Pueblo, in Colorado, with all its lands, railways, side-tracks, bridges, rights of way, depots, stations, water stations, station houses, and all other buildings, improvements, and appurtenances, and all rights, powers, easements, privileges and franchises of every nature whatsoever, then enjoyed, held or owned, or which

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might at any time thereafter be acquired by the said Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, for the purpose of constructing or operating said
297 railroad, for the term of thirty years from and after the first day of September, 1875, upon certain terms and conditions in said indenture of demise contained, as by a copy of said indenture filed herewith will more fully appear, and to which your orator craves leave to refer with the same benefit to itself as if the same were herein set forth at length.

And your orator further shows unto your Honors that the said Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, did about the month of March, 1876,
298 construct its line of railroad between the eastern line of the State of Kansas and the City of Pueblo, a distance of 148 miles, and that immediately upon the construction of the said road and as the same was being constructed, possession thereof was delivered to the said Atchison, Topeka and Santa Fe Railroad Company, under the lease hereinbefore mentioned, and the said Atchison, Topeka and Santa Fe Railroad Company, on the 19th day of October, 1878, was and ever since has been and still is operating the same under the lease hereinbefore mentioned.

299 And your orator further shows unto your Honors that heretofore, to-wit: on the 22d day of June, 1878, it was agreed between the said Atchison, Topeka and Santa Fe Railroad Company, and the said Pueblo and Arkansas Valley Railroad Company, the predecessor of your orator, that said last named company should extend its road from Pueblo to Leadville and the San Juan mining district, and construct that year the road from Canon City to the South Arkansas river, and that such road, when completed, should be operated by the Atchison, Topeka and Santa Fe Railroad Company, under the lease hereinbefore mentioned, and upon the terms and conditions
300 therein stated relative to the line from Kansas to Pueblo; and

that afterwards, on the 17th day of September, 1878, it was agreed between the said Atchison, Topeka and Santa Fe Railroad Company and your orator that your orator should forthwith construct its railroad from Pueblo to South Arkansas river and Leadville, a distance of 156¼ miles, and that said road, when so constructed, should be operated under the said lease by the said Atchison, Topeka and Santa Fe Railroad Company, on the terms and conditions therein mentioned.

And your orator further shows that, by reason of the several agreements hereinbefore mentioned, the said Atchison, Topeka and Santa Fe Railroad Company, upon the 19th day 301
of October, 1878, occupied, and ever since that time has occupied, and still occupies, the relation of lessee of your orator, of the railroad constructed and to be constructed by your orator from Canon City to Leadville; and all agreements made and entered into by either of said parties, enured to and were for the benefit of both of them.

And your orator further shows unto your Honors that its predecessors, the Canon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company, from which your orator was created and organized by consolidation, as stated in the supplemental bill heretofore filed by 302
your orator, have, since the granting of the injunction in the original cause, to-wit, on the first day of June, 1878, constructed a railroad from Canon City to a point on the north side of the Arkansas river, known as the twentieth mile post, and that the said lessee of your orator is now engaged in operating the same, and is transporting persons and property thereon, and your orator is now constructing a railroad from said twentieth mile post to Leadville.

And your orator further shows unto your Honors that the said Atchison, Topeka and Santa Fe Railroad Company, as the 303
said lessee of your orator, and as the lessee of the Denver and Rio Grande Railway Company and as the owner of a certain

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line of railway from Topeka, in the State of Kansas, to the western boundary line of said state, has been ever since the 13th day of December, 1878, and still is, with a temporary interruption, operating the said several lines of railway as one line, and for the common and joint interests of all parties interested in said respective railroads, and that by means of
304 the operation of said railroads, large gains and profits have arisen and still are arising to your orator from an interchange of business and traffic to and from its said line of railway from Canon City to the twentieth mile post hereinbefore mentioned, of which gains and profits your orator would be deprived by a severance of its line from Canon City to said twentieth mile post from the said other lines operated as a whole, as aforesaid.

And your orator further shows unto your Honors that said railroad so constructed is wholly located upon the north
305 side of the Arkansas river, that the right of way upon which said road was constructed for the distance of three and twenty-four one hundredth miles from Canon City, is the property of your orator, and was acquired by condemnation, purchase, or license from parties then owning the same, and that for the distance aforesaid, the land over which said right of way was acquired was sold by the government of the United States many years since, and your orator acquired its said right of way from the grantees of the government of the United States or their assigns, and the Denver and Rio Grande Rail-
306 way Company has not and never had any claim whatever to said right of way for the distance of three and twenty-four one hundredth miles aforesaid.

And your orator further shows unto your Honors that said road, so constructed by your orator, and its predecessors, as aforesaid, from the right of way so acquired and owned by your orator, along the north side of the Arkansas river to a point near the seventh mile post for the distance of 17,400 feet, was constructed upon lands theretofore belonging

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to the United States, and not disposed of by it, said last mentioned point being at the entrance into the canon known as 307
the "Royal Gorge," wherein it is impracticable to construct and operate two railroads.

And your orator further shows unto your Honors that up to the entrance into the said Royal Gorge, it was, in the year 1877, ever since has been, and still is entirely practicable and feasible to construct a railroad upon the south side of the Arkansas river in every respect equal to the one which has been or might be constructed upon the north side of said river to said entrance into said Royal Gorge, and that a railroad, so 308
constructed upon the south side of said river from said Canon City to the entrance into the said Royal Gorge at the point hereinbefore mentioned, could be maintained and operated with equal ease and feasibility and at no greater expense than the one constructed upon the north side of said river. But your orator admits that the first cost of construction of a road upon the south side of said river would require a larger expenditure of money than one upon the north side of said river; and your orator does and will insist that it, having located and constructed its railroad in good faith should be permitted to 309
retain its line of road so constructed and now in operation, as aforesaid, upon payment to the Denver and Rio Grande Railway Company of the difference in the cost of construction of a road on the south side of the river from the cost of constructing a road on the north side of the same, if and when said Denver and Rio Grande Railway Company are equitably entitled to the same.

And your orator further shows unto your Honors that said road, so constructed from the entrance into the Grand Canon, as aforesaid, for the distance of 6,600 feet is through a 310
narrow gorge, commonly called the Royal Gorge, where it is impracticable to construct and operate two railroads, and your orator avers that the use of that portion of the line of railroad so constructed by your orator, by two railroad companies,

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would require rules and regulations relative to the use, defining the rights and obligations of the parties using the same, for their safety, and for the safety of the public.

And your orator further shows unto your Honors that it
311 was, in the year 1877, and ever since has been, and still is, entirely practicable and feasible to construct a railroad on the south side of the Arkansas river from the eight 37-100th mile post, the west end of the Royal Gorge, to the twentieth mile post, a distance of eleven 63-100th miles, in every respect equal to the one constructed by your orator on the north side of the river, and that a railroad so constructed upon the south side of said river from the eighth 37-100th mile post to the twen-
312 tieth mile post, a distance of eleven 63-100th miles, could be maintained and operated with equal ease and feasibility, and at no greater expense than the one constructed by your orator on the north side of said river. But your orator admits that the first cost of construction of said road on the south side of said river would require a larger expenditure of money than the one upon the north side; and your orator does and will insist that it, having located and constructed a road in good faith, should be permitted to retain its line of railroad so constructed and
313 in operation as aforesaid, upon payment to the Denver and Rio Grande Railway Company of the difference in the cost of construction of a road on the south side of the river from the cost of constructing a road on the north side of the same if and when the said Denver and Rio Grande Railway Company are equitably entitled to the same.

And your orator further shows unto your Honors that if it should be finally adjudged that the Denver and Rio Grande Railway Company has the prior right of way for said distance of 6,600 feet through the Royal Gorge, then said last
314 mentioned company should pay to your orator, the reasonable cost of constructing said road through the Royal Gorge, before it should be allowed to take possession thereof, and that whan such possession is taken by the said Denver and

Rio Grande Railway Company, rules and regulations for the joint use of the same should be made as aforesaid, and the compensation to be paid by your orator for such uses of said railroad, and for maintaining the same, should be prescribed.

And your orator further shows unto your Honors that it is rightfully entitled to the possession of all of the constructed railroad of the Denver and Rio Grande Railway Company, 315
and that the said Denver and Rio Grande Railway Company has not had since the 13th day of December, 1878, and has not now any railway from Pueblo to Canon City, nor from Canon City to the said twentieth mile post, and has no means of reaching the said Royal Gorge by any railway of its own, and never can reach said gorge until it constructs a road for that purpose, or is allowed to appropriate the railroad of your orator to said gorge, and that the said Denver and Rio Grande Railway Company has no occasion to use, and can- 316
not use, the railroad so constructed through said gorge for any purpose whatever until it has constructed a road to the same, or is allowed to appropriate the road of your orator, constructed on its own land for the distance of three and thirty-four one-hundredths miles, and on the land of the government of the United States for the distance of fourteen and ninety-two one-hundredths miles, as aforesaid; that, although said Denver and Rio Grande Railway Company has located a line of railroad on the south side of the Arkansas river for 317
the distance last mentioned, and has in some places partially graded the same, yet it has never completed the grading of said road.

And your orator further shows unto your Honors that the said Denver and Rio Grande Railway Company cannot reach the entrance into the said gorge at the west end thereof or approach the same by railway until it constructs a road, or appropriates the road of your orator, and under these circumstances, your orator does and will insist if the Denver and Rio Grande Railway Company is equitably entitled to appro-

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318 priate the railroad of your orator on both sides of said Royal Gorge in order to reach the same, that your orator should be paid for the road so sought to be appropriated by the Denver and Rio Grande Railway Company, and should be allowed to use the same under proper rules and regulations prescribed by the court, so far as it may be necessary to preserve and continue its traffic and business until it shall have a reasonable opportunity to construct another road in the place of the road of your orator, so sought to be appropriated by the said Denver and Rio Grande Railway Company.

319 Your orator further shows unto your Honors that the cost of construction of the said three and twenty-four one-hundredths miles was about $40,000; that the cost of consruction of said 17,400 feet was about $100,000; that the cost of construction of said 6,600 feet was about $50,000; and that the cost of construction of said eleven and sixty-three one-hundredths miles was about $250,000.

Your orator further shows unto your Honors that the Denver and Rio Grande Railway Company is totally insolvent,
320 and that said last mentioned company ought to pay your orator for the road constructed by your orator before it is allowed to appropriate and use any part thereof.

To the end, therefore, that the said Denver and Rio Grande Railway Company may, if it can, show why your orator should not have the relief hereby prayed, and that the said Denver and Rio Grande Railway Company true and perfect answer make unto all and singular the matters and things hereinbefore stated and charged, answer under oath being hereby expressly waived, and that an account may be taken of
321 the reasonable cost of construction of the several sections of railroad so constructed by your orator as aforesaid, and of the reasonable cost of constructing a railroad from a point three and twenty-four one-hundredth miles from Canon City to the

entrance of the Royal Gorge, and from a point after passing through the Royal Gorge on the south side of the river opposite the end thereof, to a point opposite the twentieth mile post on the south side of the Arkansas river for a distance of eleven and sixty-threee one-hundredth miles; and that an inquiry may be made in such manner as your Honors shall direct relative to what rules and regulations should be prescribed for the joint use of said 6,600 feet through the Royal Gorge hereinbefore mentioned, and of the cost of maintenance and care of the same, and of the length of time reasonably required for the construction of a railroad for the distance of fourteen and ninety-two one-hundredths miles, to be used in the place the railroad of your orator sought to be appropriated by the said Denver and Rio Grande Railway Company; and that upon such accounting and inquiry your orator may have such relief as justice and equity may require. 322 323

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,

BY WM. B. STRONG, *Gen'l Manager.*

C. BECKWITH,
G. B. REED,
WILLARD TELLER,
C. E. GAST.
} *Solicitors and of Counsel.*

UNITED STATES OF AMERICA,
District of Colorado. } ss.

I, William B. Strong, being duly sworn, testify and say: That I am the general manager of the Pueblo and Arkansas Valley Railroad Company, the complainant in the foregoing bill of complaint, and as such am authorized to sign the same; that I have read the foregoing bill of complaint, and know the

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324 contents thereof, and that the matters and things therein stated are true.

I further say that I am better acquainted with the matters and things stated in said bill of complaint than any other officer of said company in the state of Colorado.

WM. B. STRONG.

Subscribed and sworn to before me this 26th day of June, A. D. 1879.

JAMES M. LOWERY,
Notary Public.

[NOTARIAL SEAL.]

(endorsed)

155.

SUPPLEMENTAL BILL,
No. 2.

Filed June 26, 1879.
EDWARD F. BISHOP,
Clerk.

C. BECKWITH,
Solicitor.

And afterwards and on to-wit: the 27th day of June, A.
324½ D. 1879, came the said defendant by E. T. Wells, esq., its solicitor, and filed in said court in said cause its Demurrer to Supplemental Bill, and the said demurrer to supplemental bill is in words and figures as follows, to-wit:—

DEMURRER TO SUPPLEMENTAL BILL.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

In Equity.

On mandate from the Supreme Court.

The defendant by protestation, not confessing or acknowledging any or all of the matters and things in the amendment 325
by way of supplemental bill, filed on the 26th day of June, A. D. 1879, by the Pueblo and Arkansas Valley Railroad Company, claiming to be successor to the complainant, to be true in manner and form as therein set forth, doth demur thereto, and for cause of demurrer says:

1st. The complainant by its own showing in and by its said supplemental bill, sets forth causes of action other and different from anything allaged in the original bill, and which have occurred since the filing of the original bill, and upon 326
which a decree in its behalf is prayed, without reference to the original bill.

2d. It is against the course and practice and not within the jurisdiction of this court to permit a plaintiff who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that occurs after the filing of the original bill.

3d. It is against the course and practice and not within the jurisdiction of this court to permit a plaintiff to file a supplemental bill to support a bad title, by allegations of another 327
title acquired after the filing of the original bill.

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4th. By complainant's own showing the said complainant and defendant are citizens of Colorado, and there is nothing contained in said supplemental, conferring jurisdiction upon this court to hear and determine the matters alleged therein.

Wherefore, and for other good causes of demurrer in said supplemental bill contained, this defendant doth demand judgment, whether it shall be compelled to answer said supplemental bill, and prays that the same may be dismissed.

E. T. WELLS, *Sol'r for Def't.*

J. P. USHER,
L. K. BASS.
JAS. GRANT. } *Of Counsel.*

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We hereby certify that in our opinion the above demurrer is well founded in point of law.

E. T. WELLS,
Sol'r for Def't.

J. P. USHER,
JAS. GRANT. } *Of Counsel.*

UNITED STATES OF AMERICA.
District of Colorado. } ss.

William J. Palmer, being first duly sworn, doth depose and says that he is the President of the Railroad Company, defendant, and that the foregoing demurrer is not interposed for delay.

(endorsed)

155.

Circuit Court United States,

DISTRICT OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

DEMURRER TO SUPPLEMENTAL BILL.

Filed June 27, 1879.
EDWARD F. BISHOP,
Clerk.

E. T. WELLS,
Solicitor for Defendant.

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And afterwards and on to-wit: the 30th day of June, A. D. 1879, came the said defendant by E. T. Wells, Esq., its solicitor, and filed in said court in said cause its amended answer to Supplemental Bill, and the said amended answer to the Supplemental Bill is in words and figures as follows, to-wit:—

AMENDED ANSWER TO SUPPLEMENTAL BILL.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY, vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY.	Bill in Equity 330
No. 155	Depending on mandate from the Supreme Court.

The amended and substituted answer of the Denver and Rio Grande Railway Company to the supplemental bill of the Pueblo and Arkansas Valley Railroad Company filed on 24th May, 1879.

This defendant reserving to itself all benefit and advantage of exception to the many errors and uncertainties of said bill for answer thereto says: That it does not know and does not admit that the complainant is a corporation, having performed the acts, and with the powers, rights and privileges in 331

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the bill alleged, and demands proof thereof; but if complainant shall make the truth of such averments appear, then this defendant says:

That it is not admissible as matter of law for the said Pueblo and Arkansas Valley Railroad to set up in bar or delay of the enforcement of the mandate of the Supreme Court any new matter arising out of alleged contracts subsequent to the appeal, and for which the Pueblo and Arkansas Valley Railroad Company might have an independent right of action
332 at law, or original bill in equity; that no new right arising out of contracts or bargains, subsequent to the original action can be brought to bar the enforcement of the mandate.

2. That for any action on any such alleged contract between the Pueblo and Arkansas Valley Railroad Company and the Denver and Rio Grande Railway Company subsequent to the original decree, this court has no jurisdiction by reason of the citizenship of the parties, both being citizens of Colorado.

3. Reserving and saving this right, and others to be hereinafter stated, to deny the jurisdiction of this court over
333 the subject matter or parties to said supplemental bill, this defendant admits that on the 20th April, 1878, the Canon City and San Juan Railway Company exhibited its bill of complaint in the District Court of Fremont county against this defendant as in said bill mentioned of the same matters as in the said supplemental bill recited.

4. Admits that about the time in said bill of complaint mentioned, this defendant exhibited in this Honorable Court its bill of complaint against the said Ebenezer T. Alling and the others in said supplemental bill in that behalf mentioned,
334 setting forth in substance the matters in said supplemental bill recited.

5. Admits that thereafter proceedings were had in the said two causes substantially as in the said supplemental bill set forth; and that at or about the time in said supplemental bill mentioned decrees were had and given by this Honorable Court substantially as in the said supplemental bill mentioned; that upon appeal by this defendant from the two said decrees, the decrees aforesaid were reversed and the said causes remanded to this court with directions as set forth in the opinion of said supreme court; and that at or about the time in the said supplemental bill mentioned the mandate of the said 335
supreme court was returned to and filed in this Honorable Court.

6. Whether after the prosecution of said appeals by this defendant to the supreme court, the said Canon City and San Juan Railway Company and the said Pueblo and Arkansas Valley Railroad Company, or either of them did resolve to form a consolidated corporation or merge or consolidate their respective capitals, franchises, rights or properties into one consolidated corporation by the name in the said supplemental bill set forth; whether if so such consolidated corporation is the same supposed corporation named as plaintiff in said sup- 336
plemental bill; whether the directors of said original corporation did by proper conveyance or otherwise transfer and set over to the said supposed consolidated company, the property, rights, privileges and franchises or any thereof of the said two original corporations; or whether the directors of the said supposed consolidated company did call in the shares of stock of such original corporation, or issue in lieu thereof shares of the said supposed consolidated corporation, this defendant hath no knowledge or belief, and hath not been informed save by the said supplemental bill, and this defendant requires proof thereof. 337

But this defendant further answering saith this defendant is advised by counsel and so charges that the said supposed

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consolidation, if any such hath occurred, were of parallel and competing lines of road, and the conveyance, if any, by the directors of the said two corporations to the said so-called consolidated company, of the property, rights, privileges and franchises of the said two supposed original corporations and all such actings and doings were contrary to law,—in violation of the provisions of the constitution of the state, and utterly void; and that the said plantiff is not a corporation, nor
338 entitled to implead this defendant, and this defendant hopes it will be allowed the benefit of this defense in like manner as if the same were set forth by plea.

This defendant knows nothing about the construction by the Pueblo and Arkansas Valley Railroad Company or its owning a railroad commencing at the western terminus of the Atchison, Topeka and Santa Fe Railroad at the boundary line of the State of Kansas and Colorado, and extending up the Arkansas river to the city of Pueblo. It knows nothing
339 of any lease of the same to, or its operation by the Atchison, Topeka and Santa Fe Railroad, or of its forming a continuous line of travel from Pueblo to the Missouri river; and if such facts are material to this cause it requires proof therof.

6½. This defendant knows nothing of the alleged memorandum of agreement said to be made dated on October 4th, 1878, signed by Thomas Nickerson on behalf of the Atchison, Topeka and Santa Fe Railroad Company, Joseph Nickerson for the Pueblo and Arkansas Valley Railroad Company, Joseph D. Potts and Sebastian B. Schlessinger for the Denver and Rio Grande Railway Company, and said to be approved
340 by W. J. Palmer, president of the Denver and Rio Grande Railway Company. Such protocol or memorandum was not made by authority of defendant, or ever made known to this defendant, or acted upon or adopted by its Board of Directors or Stockholders; and no agreement or lease of the Denver and Rio Grande Railway Company was ever

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made in pursuance of said protocol, and this defendant is not bound by the agreement of stockholders, in relation to their stock in the Denver and Rio Grande Railway Company.

This defendant further answering in relation to said Exhibit "B" saith, that as a memorandum or protocol of agree- 341
ments to be made, it refers to agreements which if made, are contrary to the laws of the land, and cannot be enforced in a court of equity; and the said laws do not permit corporations to purchase the stock of other railway corporations or to pay in exchange therefor their own stock; and the Pueblo and Arkansas Valley Railroad Company has never acquired any right of action against the Denver and Rio Grande Railway Company by reason of anything done or authorized to be done under said protocol.

7. This defendant denies that on the 19th of October, 1878, or at any other time, in pursuance of or to effectuate said 342
alleged preliminary agreement, the Denver and Rio Grande Railway Company executed to the said Atchison, Topeka and Santa Fe Railway Company a lease of its entire constructed line of railway to continue for thirty years from December 1, 1878, in consideration of certain rentals therein stated to be paid and of certain covenants therein named to be kept and performed, referred to as Exhibit "C" of said bill.

8. This defendant denies that cotemporaneously with the execution of said pretended lease, or at any other time, there was executed between William J. Palmer, presi- 343
dent of the Denver and Rio Grande Railway Company and Alden Speare, one of the directors of the Pueblo and Arkansas Valley Railroad Company, a contract marked Exhibit "D."

9. This defendant denies that cotemporaneously therewith, a certain other contract was executed between the

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Atchison, Topeka and Santa Fe Railway Company and the defendant, a copy of which is marked Exhibit "E."

10. Further answering this defendant avers, that neither Exhibit "C" called the lease, nor Exhibit "D" were ever executed; that the alleged agreement "D" between Palmer and Speare
344 purports to be a personal contract between them, for their own benefit, not as officers in behalf of their respective companies, never delivered or executed, but signed and deposited with Sebastian B. Schlessinger in escrow; to be delivered only after the performance of certain conditions therein named; the performance of all of which were to be made before they were to be delivered; and the said conditions have not been performed to this time, and said papers are still unexecuted, and held by Schlessinger, and no right whatever has or can arise upon said papers or either of them until said conditions
345 are all performed. Further answering, this defendant says that the Atchison, Topeka and Santa Fe Railway Company is a foreign corporation, a citizen of the State of Kansas, and that it had not on the fourth day of October, 1878, and has not since that date, nor during the period named when said alleged exhibits were signed, or when said alleged agreement of escrow was signed, filed in the office of the Secretary of the State of Colorado, and in the office of the Recorder of Deeds in the counties in which its business was carried on in
346 Colorado, a certificate signed by its president and secretary, duly acknowledged, designating the principal place where the business of said corporation should be carried on in this state, and an authorized agent or agents upon whom process might be served; and it had not filed in the office of the Secretary of State, a copy of its charter of incorporation or a duly certified and authenticated certificate by the proper authority, of its incorporation under a general law of incorporations; and by reason thereof and the laws of Colorado, all the acts

alleged to have been done in said bill by said company are contrary to law and null and void. 347

11. This defendant denies that the business and traffic of the Atchison, Topeka and Santa Fe Railway Company and this defendant company rightfully passes over the line of the railroad of the Pueblo and Arkansas Valley Railroad Company, but defendant admits that under pretext of right by virtue of said alleged contracts the Pueblo and Arkansas Valley Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company have wrongfully attempted, and to their utmost have to the great injury of defendant diverted all the traffic of defendant's road over their lines.

Further answering this defendant says that the alleged 348
contract, Exhibit D, was intended to be and was a personal contract between Palmer and Speare as individuals to exchange stocks belonging to themselves, with each other, and no benefit was to arise therefrom to the corporations, the stocks of which were to be exchanged by Palmer and Speare; that the proposed lease contract, Exhibit C, was in the future to become, upon conditions to be performed, a contract solely between the Atchison, Topeka and Santa Fe Railroad Company and the Denver and Rio Grande Railway Company.

*Deny that any of the supposed contracts in the bill men- 349
tioned were made in any way for the benefit of the plaintiff, or that they so inure.

12th. This defendant knows nothing of the ratification of the said alleged lease, by the directors of the Atchison, Topeka and Santa Fe Railroad Company; it requires proof thereof and denies that the directors or the company had any authority to make or ratify the same. This defendant denies that the same was ratified at any time by its stockholders by resolution to become effectual when possession should be given by order of the President of said company, or upon any condition or

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350 otherwise howsoever. This defendant denies that this defendant had authority to make it, or ever did make it, denies that its stockholders had lawful authority to ratify said lease; denies that its President was authorized to give possession of the property under the alleged lease, and denies that he ever has done so.

13th. This defendant denies that possession of the said alleged demised road, its rolling stock and appurtenances was given to the Atchison, Topeka and Santa Fe Railroad Company on the fourteenth of December, 1878, by the Denver and Rio Grande Railway Company, and denies that the said Atch-
351 ison, Topeka and Santa Fe Railroad Company is now or has been since the date aforesaid in possession of the same, operating the said alleged demised railroad under said alleged lease. This defendant denies that said Atchison, Topeka and Santa Fe Company has ever operated or pretended to operate or hold possession of said railroad under the alleged lease.

14th. This defendant knows nothing about the alleged transfer of 42,510 shares of stock to a trustee, under an alleged agreement between Palmer and Speare, and denies the same. This defendant denies that said stock is held in trust
352 for the Pueblo and Arkansas Valley Railroad Company, and denies that the Pueblo and Arkansas Valley Railroad Company holds a controlling interest in the management of the affairs of the Denver and Rio Grande Railway Company. And this defendant sets up as matter in bar of any such right under the laws of Colorado, that the Pueblo and Arkansas Valley Railroad Company cannot become a purchaser of the stock of the Denver and Rio Grande Railway Company.

15th. This defendant denies that said alleged contracts were ever executed, but it admits that at the date thereof, the Pueblo and Arkansas Valley Company and the

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Denver and Rio Grande Company were engaged in rival 353
and competitive construction of railroads from the 20th mile post west of Canon City up the valley of the Arkansas, but not from Canon City through the canon of the Arkansas river; the Pueblo and Arkansas Valley had surveyed a rival line from Pueblo to Canon City parallel with which the Denver and Rio Grande had a finished road. The Canon City and San Juan Company was engaged in building the line from Canon City over defendant's right of way granted by Act of Congress through the Grand Canon to the 20th mile post; and this was the ground in controversy in this 354
suit: The Denver and Rio Grande was not pretending, but doing all it could to build a road from Canon City through the Grand Canon upon its granted right of way as well as it could do without violating the injunction of this court, which prevented defendant from building on its own line, as has been since determined by the supreme court.

16th. It is true that these controversies and conflicts were disastrous to this defendant, because this court erred in granting said injunction. This defendant denies that any contracts were ever made, or were ever pretended to be made, with the 355
intent and design of ending the controversies between complainant and defendant existing or growing out of the conflicting claims of said companies to these located lines from Canon City westward to South Arkansas and Leadville; this defendant denies that for the purpose aforesaid, or any purpose, the defendant and the Pueblo and Arkansas Valley Railroad Company at any time or any place, or under any circumstances or for any consideration whatever, ever agreed that the Denver and Rio Grande Company should abandon its claim to the line in controversy through the Grand Canon or elsewhere.

* And this defendant saith that if any such agreement was 356
ever made by this defendant with the said plaintiff or any other

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person or corporation no conveyance or memorandum thereof in writing was ever executed or subscribed by this defendant, or any one on its behalf; wherefore defendant insists that by the statute in such case made and provided, commonly called the statute of frauds, all such agreements, if any were made, were and are absolutely null and void.

This defendant denies that it ever entered into any of the supposed contracts, treaties or agreements with the plaintiff as
357 it by its bill has alleged. From first to last this defendant has to its utmost striven to protect its grants and property against the intrusion of the plaintiff.

And further answering this defendant says that it did not after October 4th, 1878, have any negotiation with the Pueblo and Arkansas Valley Railroad Company about its line of railroad from Canon City to the 20th mile post, and thence up the valley of the Arkansas river to Leadville, or any other line whatever: that in its negotiations with the Atchison, Topeka and Santa Fe, in relation to a proposed lease of its constructed
358 line of railroad, which is described in the paper Exhibit C, yet in escrow, a proposal was made by the Atchison, Topeka and Santa Fe Railroad Company to insert among the proposed property to be leased, the words "located lines of the Denver and Rio Grande Company," and such words were put in a draft of the proposed lease, and afterwards stricken out, upon the demand of parties representing this Company, and the counsel representing the Atchison, Topeka and Santa Fe Company assented thereto, and the proposed lease as signed and deposited in escrow, did not and does not contain the words,
359 "located lines" of the defendant's railroad. The subject was discussed at the time by the parties representing said defendant and the Atchison, Topeka and Santa Fe Company, that company desiring that a clause should be inserted in the proposed lease which should give them the right to control or interfere with the lines of road and rights of way over all these

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parts of defendant's line of railroad, not yet constructed. This being apparent, the parties acting for defendant emphatically refused to allow any such thing to be done, and the Atchison, Topeka and Santa Fe Company abandoned the proposal, saying the rights claimed by defendant were not worth anything. 360

17th. Further answering this defendant denies that after the appeals were prosecuted to the Supreme Court, the Denver and Rio Grande Railway Company located a line and began the construction thereof, and graded a distance of about three miles in and above the said Canon, which location extended from Canon City through the Grand Canon of the Arkansas river, upon the south side thereof, and was in no respect in conflict with the location of the Pueblo and Arkansas Valley Railroad upon the north side of the river, and it denies that after the execution of said contracts, the contractors and employes of the Denver and Rio Grande then at work on 361
the located line of the defendant were discharged and their contracts canceled. They deny that it was agreed that it should be done; and that said contractors were by agreement between the Pueblo and Arkansas Valley Railroad Company and the defendant taken into the employ of the Pueblo and Arkansas Valley Company and given new contracts by it, and defendant submits that if all these things had been done its rights under the grant by Congress remained in full force.

18th. This defendant says that it knows nothing of the 362
circular of General Palmer to its stockholders. It was not addressed to or communicated to this defendant as a corporation. It was never presented to its Board of Directors or approved by them; and this defendant insists that there is nothing in said circular or opinion of General Palmer which conveys away or was intended to, or could lawfully convey away, the right of the Denver and Rio Grande Company, granted by the Act of Congress of 1872.

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19th. Further answering this defendant denies that the alleged lease, or other alleged contracts even though fully exe-
363 cuted, or the acts and doings of the defendant constitute a release of any errors there may be in the decrees of this court; it denies that whatever right it had to construct a line of railroad through the Arkansas Canon cannot now be availed of to the prejudice or injury of the plaintiff.

20th. This defendant denies that the stockholders of its company holding a large majority in value of its shares, on the 8th of February, 1878, formally applied to William J. Palmer, President of said company, to call a meeting of said stockholders for the purpose of taking corporate action as to whether
364 any further expenditures should be made in extending said company's line west of Canon City, and that Palmer refused and still refuses to permit the stockholders to determine by corporate vote whether the acts and doings of its officers were the will of the corporation. This defendant says that its Board of Directors are by law made the managers of the corporation, and the stockholders and Board of Directors have both authorized the prosecution and defense of these suits; and until said Directors are changed by the lawful vote of the stockholders,
365 at the times fixed by law and the charter of the company, the Directors have the sole power to prosecute and defend its suits and manage its affairs.

21st. This defendant denies that since the passing of the decrees by this court, the Pueblo and Arkansas Valley Railroad has been fully completed through the Grand Canon of the Arkansas river. It denies that acting largely upon the faith of the alleged lease and other contracts herein set forth, and upon the security of the rights given to the plaintiff thereunder, and by a large expenditure of money, the said railroad has
366 been graded, bridged and ironed, and is ready for successful operation.

Further answering in this regard this defendant says, that no claim was made by the Atchison, Topeka and Santa Fe Railroad Company to this right of way in the negotiations, preceding and at the signing of the alleged lease, not yet executed, of 19th October, 1878; that a proposal to include the disputed right of way in the lease was rejected by defendant, and abandoned by the Atchison, Topeka and Santa Fe Railroad Company. That after the transactions of the 19th of October when a proposal to continue or abandon a suit then and now pending 367
ing in this court between this defendant as plaintiff, and the Pueblo and Arkansas Valley Railroad Company as defendant, about the right of way in the Arkansas Valley above the 20th mile post was made by the Atchison, Topeka and Santa Fe Railroad Company, it was rejected by this defendant that when affidavits were filed by Nickerson and others in the Supreme Court in January last, that the Atchison, Topeka and Santa Fe Railroad Company had made an agreement about the matters in controversy, it was denied; that the filing of these affidavits was the first notice to this defendant that any such claim 368
of any kind was made, and it was immediately denied, and whenever and wherever any adverse or hostile claim to the premises in dispute has been set up, it has been denied by this defendant. This defendant further answers on information and belief that when it was known that the suit had been decided in favor of this defendant, only about three miles and a half of track had been laid in the canon; the parties building said road, over the grant to this defendant, with a full knowledge of said decisions continued to trespass on the right of way of 369
this defendant, in their own wrong, and all the work which has been put on the right of way of this defendant since said decision, was done for the purpose of compelling compensation therefor, and to embarrass and ruin this defendant.

22d. Further answering this defendant again insists that there is nothing in said supplemental bill which justifies a

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delay in the executing of said mandates from the Supreme Court, and this defendant prays that this court may make the orders required thereby, dissolving the injunction against this
370 defendant, and enjoining the plaintiff and its agents, servants and assigns from interfering with the right of way of the defendant, according to the prayer of the defendant's original bill; and as to any claim for compensation by reason of any supposed facts referred to in the opinion of the Court this defendant prays that the Court may reserve in the execution of said mandate with authority to make all proper enquiries and all proper and lawful orders to protect any rights for compensation to the plaintiff in the suit in the contingencies named in the opinion of the Court, but that no order or decree should
371 be entered in favor of the plaintiff or any claimant adverse to this defendant, until it shall be made to appear in due form of law, that such party is entitled to the consideration of this Court, and to seek its jurisdiction by reason of their charter, and proper acts and proceedings under it and the Act of Congress of March 3d, 1875.

And further this defendant says that the said Atchison, Topeka and Santa Fe Railroad Company being a foreign corporation and undertaking to do business in this State of Colorado by entering into agreements with this defendant to be
372 thereafter performed upon conditions as aforesaid, and to transact business by the control, management and operation of defendant's railroad in the several counties in which the same is located, did not and has not filed any certificate signed by its president and secretary, duly acknowledged by them, with the Secretary of State and in the offices of the Recorders of Deeds in the several counties or any of them in which they propose to and have carried their business on in operating said railroad designating the place where its business shall be car-
373 ried on in this state and naming an authorized agent or agents in this state residing at its place of business upon whom process might be served as required by the laws of Colorado; nor

has the said Atchison, Topeka and Santa Fe Railroad Company at any time filed a certified copy of its charter with the Secretary of State; nor has it at any time or in any way observed the laws of the state in respect to foreign corporations, nor was or is it endowed with power and authority under its Kansas charter to enter into any such alleged contracts.

This defendant by way of defense to all the several rights claimed by the complainant by and through or from 374
the said Atchison, Topeka and Santa Fe Railroad Company, says that all the acts and doings alleged to have been done and performed by that company as alleged by said complainant are and were contrary to law and wholly void.

This defendant by way of defense to the demands of the complainant says that it was incorporated by virtue of articles of association filed on the day of A. D. 1870; that by the Act of Congress approved June 8, 1872, heretofore mentioned in this answer, the incorporation of this defendant 375
was established, confirming to defendant all the rights, powers and privileges in its articles of association set forth; and in the same Act of Congress there was granted to this defendant upon its ways and lines of road mentioned in its articles of association, located and to be located, one hundred feet in width, of the public lands on each side of its line or track; that as to all the line of its road in controversy in this case, this defendant has, in pursuance of the power vested in it by virtue of its articles of association confirmed as aforesaid, located 376
its line of railroad and marked the same upon the ground, whereby precision has been given to the grant by the Act of Congress aforesaid, and defendant claims and submits to the court that its right to the two hundred feet granted by Congress as aforesaid, is full, ample and complete, and ought not to be disturbed, and well hopes that the court will protect it in its right.

That as to the claim of the complainant, or any adverse claim, in this case presented to the court by defendant's adver-

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377 saries it says that they have all originated since the adoption of the constitution of this state and have no greater or other right than that conferred by the constitution and laws passed thereunder ; that the grant to this defendant, being in part the land in controversy, is private property, absolutely vested in the defendant necessary to the exercise of its functions, and incapable of transfer, so long as the corporate existence of this defendant shall remain ; that no attempt has been made by the complainant or any of its predecessors or co-adjutors to subject this property created by the grant, to public or
378 private use.

And this defendant shows to your Honor that by section 15, of Article II, of the constitution of the State of Colorado, this defendant's property cannot be confiscated, taken or damaged, or seized for public or private use, without making just compensation therefor, and that such compensation is to be made in conformity to said section and the laws of the state, and that this defendant's said property cannot be taken for public use, unless such use shall be really public ; and whether that be so or not, is a judicial question to be determined
379 without regard to any legislative assertion that the use is public.

And this defendant denies that its property can be taken for building a railroad in opposition to the railroad of this defendant, or upon its granted lands.

That one railroad upon that line is all that the public require ; and that the Federal Court has no jurisdiction to determine that question.

This defendant therefore denies the right of entry by the complainant upon its granted lands ; it denies that it has taken any measures to authorize such entry ; it asserts that the complainant is a trespasser upon the defendant's said granted
380 lands, and denies the jurisdiction of this court to determine anything upon that subject and well hopes that the court, if it makes any order upon the subject, it will be to protect this de-

fendant in its lawful rights and property, denying to the complainant any and all consideration of its pretended claims.

And this defendant denies all and all manner of conspiracy wherewith it is in the said bill charged, without this, that any other matter or thing in the said bill contained and not herein and hereby well and sufficiently answered, traversed or confessed and avoided is true to the knowledge of this deponent, all of which matters and things this defendant is ready and willing to verify, maintain and prove as the court shall direct; and humbly prays to be hence dismissed with its reasonable costs in this behalf sustained. 381

{ Seal Denver and Rio Grande Railway Co. }

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

BY WM. J. PALMER, *President*.

(endorsed)

155.

Circuit Court United States,

DISTRICT OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

vs.

THE DENVER AND RIO GRANDE RAILWAY COMPANY.

AMENDED ANSWER TO SUPPLEMENTAL BILL.

Filed June 30, 1879.
EDWARD F. BISHOP, Clerk.

And afterwards and on the same day to-wit: the 30th day of June, A. D. 1879, came the said complainant by C. Beckwith, Esq., its solicitor, and filed in said court and in said cause its replication to amended and substituted answer to supplemental bill filed May 24, 1879, and the said replication is in words and figures as follows, to-wit:— 382

REPLICATION.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

The replication of the Pueblo and Arkansas Valley Railroad Company to the amended and substituted answer of the Denver and Rio Grande Railway Company to the supplemental bill of the Pueblo and Arkansas Valley Railroad Company
383 filed on 24th May, 1879.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereto saith, that it will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the answer of the said defendant is untrue, uncertain and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained ma-
384 terial or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true—all which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct; and humbly prays as in and by its said bill it hath already prayed.

C. BECKWITH,

Solicitor for P. & A. V. R. R. Co.

G. B. REED,
WILLARD TELLER,
CHAS. E. GAST,
L. G. PRATT,
} *Of Counsel.*

(endorsed)

155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Replication to amended and substituted answer to supplemental bill, filed May 24, 1879.

Filed June 30, 1879.
EDWARD F. BISHOP, Clerk.
C. BECKWITH, *Solicitor for P. & A. V. R. R. Co.*

385

And afterwards, to-wit: on the first day of July, A. D. 1879, came the said complainant by C. Beckwith, Esq., its solicitor, and filed in said court in said cause its motion for a commission as to the Grand Canon of the Arkansas river, and the said motion is in words and figures as follows, to-wir:

MOTION FOR THE APPOINTMENT OF A COMMISSION.

IN THE

CIRCUIT COURT OF THE UNITED STATES, 386

FOR THE DISTRICT OF COLORADO.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
No. 155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Now comes the said Pueblo and Arkansas Valley Railroad Company and moves the court to appoint a commission

FOLIO

of three reputable civil engineers, not in the interest or employ of either party, to examine into and report to this court, as soon as may be, upon the following points:—

First—Whether or not it is practicable to construct a railroad upon the south side of the Arkansas river from Canon City to the twentieth mile post, or upon any or what portion of
387 said route, and whether any or what portion of said road has been partially constructed, and the extent of such construction.

Second—If found practicable to construct a railroad upon the south side of the Arkansas river from Canon City to the twentieth mile post, or for any and what portion of said route, the difference, if any, in the cost of constructing, maintaining and operating such road, and a road on the north side of said river between the same points.

Third—The value of the road as now constructed upon the north side of said river.

Fourth—The distance between said points, if any, where
388 but one track is practicable, and the value of the work now done thereon, and the cost of the work to be done to complete the same.

Fifth—A plan for the joint use by two companies of one track through the Royal Gorge for said distance and the sum which should be paid by one party to the other for such use, and proper regulations for its maintenance and the operation thereof.

Sixth—The length of time required for the construction of a railroad upon the south side of said river between the
389 points above-named, and the sum which should be paid by one party to the other for the use of the road upon the north side of the river until one upon the south side of the same shall be built.

Said commissioners to be at liberty to examine witnesses, and that such other directions may be given as will enable said commissioners to properly discharge their duties.

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,

BY C. BECKWITH, *its Solicitor.*

(endorsed)

155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY;
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Motion of commission as to "Grand Canon" Arkansas River.

Filed July 1st, 1879.
EDWARD F. BISHOP,
Clerk.
C. BECKWITH,
Solicitor for P. & A. V. R. R. Co.

390

And afterwards and on to-wit the 3d day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, assigned to the Eighth Judicial Circuit thereof, and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said Court in said cause, to-wit :—

391 155

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

In Chancery. Bill.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
THE CANON CITY AND SAN JUAN RAILWAY COMPANY.

Cross Bill.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Supplemental Bill.

At this day comes the said complainant in the supplemental bill herein, to-wit: The Pueblo and Arkansas Valley Railroad Company, by Corydon Beckwith, Esq., its solicitor, and the said defendant in the said supplemental bill by James Grant, Esq., its solicitor, also comes.

392 And the demurrer of the said defendant to the second supplemental bill of complaint of the said Pueblo and Arkansas Valley Railroad Company filed herein June 26th, last past, having heretofore come on to be heard, and having been argued by counsel and having been taken under advisement by the Court, and the Court being now sufficiently advised in the premises, it seemeth to the Court here, that the said second supplemental bill of complaint, and the matters and things therein set forth, are sufficient in law for the said defendant to answer unto.

FOLIO

And afterwards and on to-wit the 5th day of July, A. D. 1879, came the said defendant by E. T. Wells, Esq., its solici- 393
tor, and filed in said Court in said cause a certain stipulation of counsel for amendment of amended and substituted answer of defendant, and said stipulation is in words and figures as follows, to-wit:—

STIPULATION TO AMEND ANSWER.

UNITED STATES OF AMERICA,
District of Colorado.

IN THE CIRCUIT COURT OF THE UNITED STATES

WITHIN AND FOR SAID DISTRICT

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
No. 155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

To C. BECKWITH, ESQ.,
Solicitor, &c.

The defendant hath this day in pursuance of leave granted 394
by the Court, amended its amended and substituted answer to the supplemental bill of the Pueblo and Arkansas Valley Railroad Company, as follows:—

At the end of paragraph 11 insert:—

Denies that any of the supposed contracts in the bill mentioned were made in any way for the benefit of the plaintiff, or that they so inure.

FOLIO

In paragraph 16, after the words "This defendant denies that for the purpose aforesaid or any purpose the defendants and the Pueblo and Arkansas Valley Railroad Company at any time or any place or for any consideration whatever, ever
394½ agreed that the Denver and Rio Grande Company should abandon its claims to the line in controversy through the Grand Canon or elsewhere," insert:—

> And this defendant saith that if any such agreement was ever made by this defendant with the said plaintiff or any other person or corporation, no conveyance or memorandum thereof in writing was ever executed or subscribed by this defendant or any one on its behalf; wherefore plaintiff (defendant) insists that by the statute in such case made and provided, commonly called the statute of frauds, all such agreements if any were made,
> 395 were and are absolutely null and void.

Above amendment may be made by interlineation on original filed.

BECKWITH & PRATT.

(endorsed)

155.

CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

vs.

DENVER AND RIO GRANDE RAILWAY COMPANY.

STIPULATION FOR AMENDMENT OF AMENDED AND SUBSTITUTED ANSWER OF DEFENDANT.

Filed July 5, 1879.
EDWARD F. BISHOP,
Clerk.
E. T. WELLS.

And afterwards and on the same day, to-wit: the 5th day of July, A. D. 1879, came the said defendant by E. T. Wells, Esq., its solicitor, and filed in said court in said cause its Answer to Second Supplemental Bill and the said answer is in words and figures as follows, to-wit:— 396

ANSWER TO SECOND SUPPLEMENTAL BILL.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF COLORADO.

THE CANON CITY AND SAN JUAN RAILROAD COMPANY,
No. 155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

In Equity.

Mandate from Supreme Court.

The said Denver and Rio Grande Railway Company reserving to itself all manner of exception to the errors of the bill of the Pueblo and Arkansas Valley Railroad Company filed on the 26th day of June, A. D. 1876, says :—

I. That it is true that the Pueblo and Arkansas Valley Railroad Company are citizens of Colorado, and that this court by reason thereof has no jurisdiction of the parties or 397 subject matter of the bill filed by way of supplement.

II. The defendant knows nothing of the alleged lease by the Pueblo and Arkansas Valley Railroad Company, predecessor of the plaintiff, of the date of 15th November, 1875, and requires proof thereof. This defendant avers, that said lease if executed is null and void by reason of its not being authorized

FOLIO

by the laws of Colorado: that the Pueblo and Arkansas Valley Railroad Company had no right to make such a lease, and the
398 Atchison, Topeka and Santa Fe Railroad Company was and is a corporation, a citizen of Kansas, and has never complied with the 23d section of the act of the General Assembly of the State of Colorado entitled, "An Act to provide for the formation of Corporations," which prohibits it from doing any business in Colorado until said statute is complied with.

III. This defendant has no knowledge that the Pueblo and Arkansas Valley Railroad Company about the month of March, 1876, constructed its line of railroad from the western line of Kansas to Pueblo and delivered it to the Atchison, To-
399 peka and Santa Fe Railroad Company, or that the Atchison, Topeka and Santa Fe Railroad Company on the 19th day of October, 1878, and ever since has been or still is operating the same under said lease.

IV. This defendant knows nothing of the alleged agreement of June 22, 1878, between the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka and Santa Fe Railroad Company, whereby the Pueblo and Arkansas Valley Railroad Company should extend its road from Pueblo to Leadville and the San Juan mining district, and that when
400 completed it should be operated under the alleged lease. It knows nothing about any agreement such as in the bill alleged to have been made between the plaintiff and the said Atchison, Topeka and Santa Fe Railroad Company, nor whether at any time the Atchison, Topeka and Santa Fe Railroad Company has occupied or still occupies the relation of lessee to the plaintiff of any road whatsoever. Denies that agreements made by either of them inure to or were for the benefit of both. And this defendant avers, that by the laws of Colorado such alleged agreements as in the bill mentioned are null and void, the
401 same not being authorized by law so far as the Pueblo and Ar-

kansas Valley Railroad Company is concerned, and prohibited by law as to the Atchison, Topeka and Santa Fe Railroad Company, which is a foreign corporation and has never filed in the office of the Secretary of State or in the office of the Recorder of Deeds of any county, any certificate designating the principal place where the business of said corporation shall be carried on in this state or any agent or agents upon whom process may be served.

V. This defendant denies that there ever was any consolidation between the Canon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company; avers that said companies were the owners of or controlling parallel and competing lines, and their consolidation is prohibited by the laws of Colorado. 402

VI. This defendant knows nothing of the completion of a railroad by said Canon City and San Juan Railway Company or the plaintiff. This defendant avers, that in this cause, the court granted an injunction against the construction of its railroad by this defendant on its located line from Canon City to the twenty mile post; that this line interfered in its whole length, with the line claimed by the Canon City and San Juan Railway Company: by the decree of this court appealed from, this court enjoined the defendant from building a railroad on said right of way claimed and located under the act of 8th of June, 1872. This decision was reversed in April, 1879, and this court ordered to set aside the said injunction, and to enjoin the Canon City and San Juan Railway Company from interfering with this defendant on its located line for the whole of said twenty miles, and the said plaintiff, if it has constructed any railroad on defendant's said right of way did so in its own wrong, notably so as to all save one mile or thereabouts of said road, which defendant avers was constructed, if at all, after the decision of the Supreme 403 404

FOLIO

Court. If the Atchison, Topeka and Santa Fe Railroad Company, have such lease as in the bill alleged and thereunder is operating the same, which this defendant denies, the plaintiff is not the sole party in interest and cannot maintain the said bill, and the defendant prays the same benefit of this defense
405 as if the same had been taken by demurrer or plea.

VII. This defendant denies that the Atchison, Topeka and Santa Fe Railroad Company is the lessee of the plaintiff's road, or of the defendant's road, or that in any capacity it is operating the lines of road in said bill described: denies that in any capacity, said Atchison, Topeka and Santa Fe Company has been since the 13th day of December or now is operating said several lines as one line for the common and joint interest of all parties interested in said roads: denies that it is operating any line of road whatever in connection with the
406 supposed line of railway from Canon City to the 20th mile post, or that plaintiff would be deprived of any gains and profits, by a severance of the said supposed line last mentioned from the others in the bill last mentioned.

VIII. This defendant knows nothing about the allegation of the right of way for three and twenty-four one-hundredths miles from Canon City being the property of the plaintiff, acquired by purchase, condemnation, or license from parties then owning the same, by parties who acquired it from the United States.

It denies that the Denver and Rio Grande Railway Com-
407 pany has not or never had any claim to and right of way for said distance. And this defendant says that it located the right of way which it claims, not only through the said 3 24-100 miles, but the whole distance up to the 20th mile post was located by this defendant on the property of the United States, under the act of 8th of June, 1872, before the same was sold by the United States, and after the passage of

FOLIO

said act, this defendant became entitled to a right of way over the public lands along its whole right of way, and all parties were 408
bound to take notice thereof; and no condemnation process or any other process, or purchase, or license, has, or can divest the defendent thereof. This defendant further saith, that on or about the day of last past, the Central Colorado Improvement Company were the owners of the lands over which for the said 3 24-100 miles said way passes, by patent from the government of the United States: and released the said way to this defendant, and defendant is now the owner thereof and plaintiff has no right therein.

IX. This defendant denies that it is impracticable to build 409
two roads in the Royal Gorge. The evidence for the Canon City and San Juan Railway Company upon the pleadings in this cause proves it to be practicable, and said company having averred and proved that there is room for two roads in said canon is now estopped to change its ground of defense and offense and to maintain that there is room but for one road. Any road constructed by the Canon City and San Juan Railway Company on the limits of defendant's grant to the 20th mile post which was constructed on this defendant's right of 410
way, belongs to this defendant by the judgment of the Supreme Court in this cause.

X. This defendant admits and avers that it is practicable, not only up to but in the Royal Gorge and along the whole distance to build a railroad on the south side of the river, but avers that it will cost more and be more expensive to operate than one on the north side. This defendant denies that the road on the north side was built in good faith. It was begun, located and built with a full knowledge of this defendant's 411
rights, and in open hostility thereto; the judgment of this court was reversed because the Supreme Court held that the

FOLIO

defendant had the prior right, and this defendant denies the power or authority of this court to require of the defendant to try the cause again or to surrender its rights for any compensation whatever; and this defendant denies the right of this court to compel it to make any exchange of its property or rights for any other road; nor has this court jurisdiction to settle any controversy between the plaintiff and this defendant.

412 XI. This defendant further answering, repeats that it is practicable to construct and operate two railroads in the Royal Gorge; and that the plaintiff is by the former pleadings in this cause, estopped to deny it. If there was only room for one road, this defendant admits that there should be rules and regulations to its use by two companies. This defendant will be ready to make such rules and regulations as are common in such cases; and if the court thinks it is not willing to do so, or cannot be trusted to do so, until the occasion arises this de-
413 fendant will willingly consent to have them made in advance, and to abide by them when made, and the road is so used; subject always to the right of this defendant to from time to time apply to this court for proper and necessary modifications of said rules; and subject also to the right of appeal if in anything this defendant conceive itself aggrieved by any such regulations.

XII. This defendant admits and says that it is feasible and practicable to build a railroad on the south side of the Ar-
414 kansas river, from the 8 37-100 mile post to the 20th mile post, and so all the way through the Royal Gorge; it cannot be operated so well and feasibly, and will cost more to construct, operate and maintain such road; and this defendant insists that the Supreme Court having decided that this defendant has the first right to build a road on the north or south sides, and having located its road on the north side, if the plaintiff desires

another road, it must build it; and this court has no power to compel defendant to swap away its rights by receiving the difference in the cost of construction, and such a proposition is contrary to equity. 415

XIII. This defendant says it has already been adjudged, that the Denver and Rio Grande Railway Company, has the prior right of way both of the 6,600 feet through the Royal Gorge and up to the 20th mile post; and in the said judgment it was said: "It may be that during the pending of these causes in the court below, or since the rendition of the decrees appealed from, the Canon City and San Juan Company has under the authority of the court constructed its road-bed and track in the Grand Canon or some part thereof. In that event 416
the costs thus incurred in those portions of the canon which admit of only one road-bed for railroad purposes, may be ascertained and provided for in such manner, and upon such terms and conditions as the equities of the parties may require." This defendant says and the Canon City and San Juan Railway Company has averred and proved, that there is room in the Grand Canon for two roads. It submits to the court, that it should (if notwithstanding such averments and proof equity shall require) by a short order take proofs in relation thereto and if it shall be found, and the equities require, that 417
in places where but one road can be built this defendant shall pay the cost where there is room for only one road, this defendant is ready to do, and will in advance deposit a sufficient sum on getting the order for the possession of the canon as provided in the decision of the Supreme Court.

XIV. This defendant denies that the plaintiff is rightfully entitled to the possession of any of the defendant's constructed road. It denies that since the 13th day of December, 1878, the defendant hath not any railroad from Pueblo to Canon City, or from Canon City to the 20th mile post, or 418

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that it has no means of reaching the Royal Gorge by any railway of its own, and never can reach the Royal Gorge until it constructs one or is allowed to appropriate the plaintiff's railroad, or that it has no ocaasion to use or cannot use the railroad constructed by the plaintiff or to appropriate the road of the plaintiff constructed on its own land or on government land.

XV. This defendant says it has a road already built to
419 Canon City; that it has the means and lawful authority to construct and carry on that line of road to the end thereof located as set forth in its original bill herein, and the plaintiff has no right in law or equity to insist that in any event it should be paid for any part of the road claimed by this defendant, and situated upon its grant through the Royal Gorge or elsewhere; or to use or enter upon the road and way decreed to belong to the defendant under any regulations so far as it may be necessary to preserve and continue its traffic and busi-
420 ness, until it shall have time to build another road.

XVI. This defendant denies that the cost of the 3 24-100 miles was $40,000 or that it is worth that money. It denies that the cost of construction of the 17,400 feet was about $100,000 or that it is worth that; denies that the cost of the 6,60 feet was about $50,000 or that it is worth that; or that the cost of the 11 63-100 other miles is about $250,000 or
421 that it is worth that; but whatever the cost was, it was voluntarily expended to the wrong of the party expending, and with the evil intent of injuring this defendant.

XVII. This defendant denies that the allegation that it is insolvent. This defendant saith that its franchises and grants are of immense value, and are so recognized by all capitalists: that upon the publication of the decision of the Supreme Court, capitalists came forward with ten millions of

FOLIO

dollars to enable this defendant to proceed with the construction of its road. Such have been the developments in Colorado, that the value of the grants made by Congress to this defendant have immensely appreciated. The plaintiff in this suit 422
and the adversaries of this defendant in collusion with plaintiff appreciating the value of the grant in controversy are seeking by devious ways to deprive defendant of it.

XVIII. It denies that it ought to pay the plaintiff any thing. It does not seek to appropriate any road belonging to the plaintiff; it seeks to recover the land granted to it by Congress, which the Supreme Court has decided to belong to it. If any road is upon it the defendant is willing to take it, and it prays that said bill filed by way of supplement be dismissed.

THE DENVER AND RIO GRANDE 423
RAILWAY COMPANY,

By E. T. WELLS, *Solicitor.*

J. P. USHER,
J. GRANT.
E. L. SMITH,
THOS. MACON,
L. K. BASS,
} *Of Counsel.*

(endorsed)

155.

Circuit Court United States,
DISTRICT OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

ANSWER TO SECOND SUPPLEMENTAL BILL.

Filed July 5, 1879.
EDWARD F. BISHOP,
Clerk.

FOLIO

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, came said complainant by C. Beckwith,
424 Esq., its solicitor, and filed in said court in said cause its replication to answer to Supplemental Bill filed June 26, 1879, and the said replication is in words and figures as follows, to-wit:—

REPLICATION TO ANSWER TO SUPPLEMENTAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

155.

The replication of the Pueblo and Arkansas Valley Railroad Company to the answer of the Denver and Rio Grande Railway Company to the bill of the Pueblo and Arkansas Valley Railroad Company filed on the 26th day of June, A. D. 1879.

425 This repliant, saving and reserving unto itself all and all manner of advantage of exception or otherwise to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that there is any other matter or thing whatsoever in the said answer contained material or effectual in the said answer to be replied
426 unto, confessed and avoided, traversed or denied is true; all

which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. BECKWITH,

Solicitor for P. & A. V. R. R. Co.

(endorsed)

No. 155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILWAY COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Replication to Answer to Supplemental Bill, filed June 26, 1879.

Filed July 5, 1879.
EDWARD F. BISHOP,
Clerk.
C. BECKWITH,
Solicitor for P. & A. V. R. R. Co.

427

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause, to-wit:—

FOLIO

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, came said complainant by C. Beckwith,
424 Esq., its solicitor, and filed in said court in said cause its replication to answer to Supplemental Bill filed June 26, 1879, and the said replication is in words and figures as follows, to-wit:—

REPLICATION TO ANSWER TO SUPPLEMENTAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

155.

The replication of the Pueblo and Arkansas Valley Railroad Company to the answer of the Denver and Rio Grande Railway Company to the bill of the Pueblo and Arkansas Valley Railroad Company filed on the 26th day of June, A. D. 1879.

425 This repliant, saving and reserving unto itself all and all manner of advantage of exception or otherwise to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that there is any other matter or thing whatsoever in the said answer contained material or effectual in the said answer to be replied
426 unto, confessed and avoided, traversed or denied is true; all

which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. BECKWITH,

Solicitor for P. & A. V. R. R. Co.

(endorsed)

No. 155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILWAY COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Replication to Answer to Supplemental Bill, filed June 26, 1879.

Filed July 5, 1879.
EDWARD F. BISHOP,
Clerk.
C. BECKWITH,
Solicitor for P. & A. V. R. R. Co.

427

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause, to-wit:—

FOLIO

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, came said complainant by C. Beckwith,
424 Esq., its solicitor, and filed in said court in said cause its replication to answer to Supplemental Bill filed June 26, 1879, and the said replication is in words and figures as follows, to-wit:—

REPLICATION TO ANSWER TO SUPPLEMENTAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

155.

The replication of the Pueblo and Arkansas Valley Railroad Company to the answer of the Denver and Rio Grande Railway Company to the bill of the Pueblo and Arkansas Valley Railroad Company filed on the 26th day of June, A. D. 1879.

425 This repliant, saving and reserving unto itself all and all manner of advantage of exception or otherwise to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that there is any other matter or thing whatsoever in the said answer contained material or effectual in the said answer to be replied
426 unto, confessed and avoided, traversed or denied is true; all

which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. BECKWITH,

Solicitor for P. & A. V. R. R. Co.

(endorsed)

No. 155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILWAY COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Replication to Answer to Supplemental Bill, filed June 26, 1879.

Filed July 5, 1879.
EDWARD F. BISHOP,
Clerk.
C. BECKWITH,
Solicitor for P. & A. V. R. R. Co.

427

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause, to-wit:—

FOLIO

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, came said complainant by C. Beckwith,
424 Esq., its solicitor, and filed in said court in said cause its replication to answer to Supplemental Bill filed June 26, 1879, and the said replication is in words and figures as follows, to-wit:—

REPLICATION TO ANSWER TO SUPPLEMENTAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

155.

The replication of the Pueblo and Arkansas Valley Railroad Company to the answer of the Denver and Rio Grande Railway Company to the bill of the Pueblo and Arkansas Valley Railroad Company filed on the 26th day of June, A. D. 1879.

425 This repliant, saving and reserving unto itself all and all manner of advantage of exception or otherwise to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that there is any other matter or thing whatsoever in the said answer contained material or effectual in the said answer to be replied
426 unto, confessed and avoided, traversed or denied is true; all

which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. BECKWITH,

Solicitor for P. & A. V. R. R. Co.

(endorsed)

No. 155.

Circuit Court United States
DISTRICT OF COLORADO.

PUEBLO AND ARKANSAS VALLEY RAILWAY COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

Replication to Answer to Supplemental Bill, filed June 26, 1879.

Filed July 5, 1879.
EDWARD F. BISHOP,
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C. BECKWITH,
Solicitor for P. & A. V. R. R. Co.

427

And afterwards and on the same day to-wit: the 5th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause, to-wit:—

ORDER: Petition to Enforce Mandate Denied.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.
— In Chancery. For an injunction and other relief.

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THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
THE CANON CITY AND SAN JUAN RAILWAY COMPANY.
— Cross Bill. For injunction, &c.

At this day comes the said complainant by Corydon Beckwith, Esq., its solicitor, and the said defendant by J. P. Usher, Esq., its solicitor, also comes.

And thereupon the said defendant presents to the Court a petition for a decree enforcing the mandate of the Supreme Court herein and a draft of a decree therefor which are filed, and the said petition is argued by counsel.

429 And the Court being now sufficiently advised in the premises, it is ordered by the Court for good and sufficient reasons to the Court appearing, that the said petition be denied.

It is further ordered by the Court, that the said petition and draft of a decree be enrolled on the Order Book of the Court.

And afterwards and on to-wit: the 9th day of July, A. D. 1879, came the said defendant by J. P. Usher, Esq., and Jas. Grant, Esq., its solicitors, and filed in said court in said cause its protest and nomination of engineer by the defendant, and
430 said protest and nomination is in words and figures as follows, to-wit:—

PROTEST AND NOMINATION OF ENGINEER BY DEFENDANT.

THE UNITED STATES OF AMERICA, } SS.
District of Colorado. }

IN THE CIRCUIT COURT OF THE UNITED STATES

WITHIN AND FOR SAID DISTRICT

THE CANON CITY AND SAN JUAN RAILWAY COMPANY,
No. 155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Original Bill.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
No. 155. vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Supplemental Bill.

To the Judges of said Court:

The Denver and Rio Grande Railway Company, defendant herein, having received the proposal lately announced by the court in words and figures as follows, to wit:— 431

"It is proposed to appoint three commissioners, railroad engineers, one to be selected by each of the parties to this controversy, and a third by the court, who shall ascertain and report on the matters following, that is to say: In constructing

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two roads from Canon City to Leadville on the Arkansas river, to what extent must they occupy the same track. This is to be determined with reference to economical construction, and the cost of maintaining the tracks within reasonable limits. Upon the same considerations to what extent shall the roads
432 be built on opposite sides of the river, the cost of constructing and maintaining bridges for passing from one side of the river to the other to be especially kept in view. What has been done by the Canon City and San Juan Railway Company, or the Pueblo and Arkansas Valley Railway Company toward constructing a road from Canon City to Leadville. What is the location of the line so constructed or part constructed with reference to the Arkansas river and the defiles and canons of said river. What part of the line so constructed is on the
433 public domain, and what part of it on lands owned by individuals. What is the value of such line as a whole, and in sections and subdivisions. And particularly what is the value of those parts which must be used by both roads in common, stating the value of each part so to be used separately. In like manner, what is the value of the several parts which are located on the public domain, as distinguished from the parts located on lands owned by individuals. Having reference to the economical construction and the cost of maintaining both roads, if in
434 any place or places on the said line both roads may be located on the same side of the river, can that which is to be built be connected with the work already done in such place or places, so as that such work shall be available for the new line without material alteration. As a counterpart to the last question, is the work already done available only as a continuous line, or may parts and portions of it be connected with another road to be built hereafter, so as to be available to the latter, and without materially impairing the first, except in the cost of con-
435 structing the part or parts so taken. The matters aforesaid to be determined on examination of the line, on any evidence that has been taken in any of the causes now pending between

these parties; on the testimony of the engineers of either party, to be taken before an examiner, on testimony as to the ownership of the land traversed by the line taken in the same manner, on testimony as to the cost of the line already constructed or partly constructed, the court to limit the number of witnesses to be examined in these several matters." Now and at all times desiring to conform to the suggestions of the 436
court without waiving its rights, respectfully represents: That in the petition of the company to execute the mandate of the Supreme Court, and its drafts of decree filed with said petition on the seventh day of July, A.D. 1879, it was the intention and purpose of this company, under the advice of counsel, in the fifth paragraph of said draft of decree to suggest ample provision for ascertaining any claim that the plaintiffs in said above entitled causes might have to compensation or other relief under the decision of the Supreme Court. 437

This Company is reluctant to object to any plan, which the Court may suggest for the ascertainment of any matter of fact, which the opinion of the Supreme Court permits to be inquired of; but upon careful reading of the proposition of the Court, it is advised by counsel that said proposal contemplates an inquiry far outside of and foreign to anything allowed by the decision of the Supreme Court, and which in the respects hereinafter mentioned may be very prejudicial to their Company; and that such inquiry ought to be confined strictly to ascertaining whether during the pending of this original bill in 438
this court or since the rendition of the decree given therein and from which this Company appealed to the Supreme Court, the Canon City Railway Company has under the authority of this court constructed its road bed and track in the Grand Canon of the Arkansas River, or some portion thereof, which admits of only one road bed and track for railroad purposes, and the cost thereof in such places only; and to that extent this Company will consent, if proper application is made, to such inquiry.

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439 As to all other matters proposed to be inquired of, this company respectfully begs leave to enter its protest, and prays the court that if it shall be its pleasure to make an order appointing commissioners to report upon the matters in question, as authorized by the Supreme Court in its opinion delivered in the appeal of this company before mentioned, that it may please the court to insert in said order a clause to the following effect:—

"The said commission shall carefully examine, hear evidence and report whether the Grand Canon of the Arkansas river is broad enough to enable both companies to proceed
440 without interference with each other in the construction of their respective roads; whether in the narrow portions of said canon there is any place where this course is impracticable, and if so, whether any road-bed or railroad has been constructed in such place or places; and if so, when the same was constructed, specifying the times when the work was done in each of such places; and the cost and reasonable value of the same;"
—to the end that if other matters shall be inquired of and reported, this company may have the benefit of a special report distinctly based upon the foregoing clause in said order, and
441 the opportunity to move to suppress and reject all other findings.

This company protests against the submission to said commission of any other matter of inquiry: Because—

1st. Except as aforesaid there is no matter or thing proposed to be inquired of in the suggestion of the court, which comes within the purview of the decision of the Supreme Court.

2d. Because such proposed inquiry must necessarily be attended with great delay and expense.

3d. Because it is proposed that the evidence and testimony in any or all of the causes now pending between the par-

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ties to this controversy, shall be submitted to said commissioners, said testimony already covering nearly a thousand pages of printed matter wherewith this company believes it ought not to be embarrassed in obtaining execution of the decree of the Supreme Court in its appeal aforesaid the same causing great delay and enormous expense. 442

4th. Because such proposal of the court is contrary to the usages and practice of courts of equity.

Under this protest and reserving all its rights in the premises, this company respectfully suggests to be one of the said commissioners,—JOHN A. MCMURTRIE, Esq., of Pueblo, Colorado.

J. P. USHER,
JAS. GRANT,
Solicitors for the Denver and Rio Grande Railway Co. 443

(endorsed)

No. 156.

CIRCUIT COURT.

CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Protest and nomination of Engineer, &c., by D. & R. G.

Filed July 9, 1879.
EDWARD F. BISHOP, Clerk.
By F. W. TUPPER, Deputy.

And afterwards, to-wit: on the 10th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, associate justice of the Supreme Court of the 444

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United States, assigned to the 8th Judicial Circuit thereof, and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court, and in said cause, to-wit :—

ORDER: Testimony may be taken.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,	In Chancery.
No. 155 vs.	Bill.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	Cross Bill. Supplemental Bill.

At this day, all parties consenting by counsel, it is ordered,

That the testimony of Thornton K. Lathrop, William G. Russell, Sebastian B. Schlessinger and Joseph D. Potts and all
445 witnesses whose testimony either party may desire to take in Boston may be taken orally before any proper officer at Boston, Massachusetts, who may be for that purpose agreed upon between Dwight Foster, Esq., as counsel for the said defendant, and George Shattuck, Esq., counsel for the Pueblo and Arkansas Valley Railroad Company; and that such testimony when returned into court may be read in evidence herein and in cause No. 186 upon the calendar of this court, on the part of the said Denver and Rio Grande Railway Company, subject to all proper exceptions as to its competency and relevancy.

446 And afterwards and on to-wit: the 10th day of July, A. D. 1879, came the said complainant by C. Beckwith, Esq., its solicitor, and filed in said court and in said cause its nomination of General W. Soey Smith as commissioner, and said nomination is in words and figures as follows, to-wit:

NOMINATION OF COMMISSIONER BY COMPLAINANT.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLORADO.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY, DOCKETED AS THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,

No. 155 vs.

THE DENVER AND RIO GRANDE RAILWAY COMPANY.

The Pueblo and Arkansas Valley Railroad Company hereby names Gen. William Soey Smith as one of the Commissioners to perform such duties as may be imposed upon him by order of court in the above entitled cause. 447

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,

BY C. BECKWITH, *its Solicitor.*

(endorsed)

155.

CIRCUIT COURT, U. S.

Nomination of Gen. Soey Smith by P. & A. V. R. R. Co., as Commissioner.

Filed July 11th, 1879.
EDWARD F. BISHOP,
Clerk.

C. BECKWITH,
Solicitor for P. & A. V. Co.

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And afterwards. and on to-wit: the 14th day of July,
448 A. D. 1879, the same being one of the regular juridicial days of the May Term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof, and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause to-wit:

ORDER: Decree Appointing Expert Commissioners.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,	In Chancery.
155 VS.	
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	For an injunction and other relief.

449 THE DENVER AND RIO GRANDE RAILWAY COMPANY,	Cross Bill.
VS.	
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.	For an injunction, and other relief.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,	Supplemental Bill.
VS.	
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	For injunction and other relief.

This day come the said parties by their solicitors, and it appearing that in the decree heretofore and at the July term, A. D. 1878, given and allowed in this cause in this court, error hath intervened, and by the consideration and judgment of

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the Supreme Court the said decree hath been reversed and set aside, as by the mandate of the said Supreme Court now 450
of record in this cause, fully appears;

Now on this day it is ordered that the said decree heretofore given and allowed in this cause be vacated and set aside, and the said defendant shall recover of and from the said plaintiff its costs to the date of filing the said mandate to be taxed.

And the right of the said defendant to first locate and construct its railway upon the way mentioned and described in the bill of complaint herein as against the said Canon City and San Juan Railway Company and the Pueblo and Arkan- 451
sas Valley Railroad Company, and as of the date of the commencement of this suit and the date of the said decree, is recognized and established.

Forasmuch, however, as it is alleged by the said plaintiff in certain supplemental bills by it filed herein, that since the said decree, the said defendant hath granted, sold, or otherwise yielded to the said plaintiff its right of way in the premises; and forasmuch as it is also alleged by the said plaintiff that since the said decree the said plaintiff hath built wholly or in part upon the said way and upon the line hereto- 452
fore located by the said defendant, a railway of such gauge and structure as the said defendant hath proposed to build, for which as to the whole or some part thereof, the said defendant ought in equity and good conscience to pay the reasonable value, and because the value of the said railway is at present unknown to the court, no further decree touching the ultimate right of the parties can be given or allowed until the court shall be better advised in the matters aforesaid.

And it is considered by the court, that the relations of the 453
parties of and concerning the line of railway heretofore constructed or now in process of construction, as aforesaid,

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And afterwards. and on to-wit: the 14th day of July,
448 A. D. 1879, the same being one of the regular juridicial days of the May Term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof, and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court and in said cause to-wit:

ORDER: Decree Appointing Expert Commissioners.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,	In Chancery.
155 VS.	
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	For an injunction and other relief.

449 THE DENVER AND RIO GRANDE RAILWAY COMPANY,	Cross Bill.
VS.	
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.	For an injunction, and other relief.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,	Supplemental Bill.
VS.	
THE DENVER AND RIO GRANDE RAILWAY COMPANY.	For injunction and other relief.

This day come the said parties by their solicitors, and it appearing that in the decree heretofore and at the July term, A. D. 1878, given and allowed in this cause in this court, error hath intervened, and by the consideration and judgment of

the Supreme Court the said decree hath been reversed and set aside, as by the mandate of the said Supreme Court now 450
of record in this cause, fully appears;

Now on this day it is ordered that the said decree heretofore given and allowed in this cause be vacated and set aside, and the said defendant shall recover of and from the said plaintiff its costs to the date of filing the said mandate to be taxed.

And the right of the said defendant to first locate and construct its railway upon the way mentioned and described in the bill of complaint herein as against the said Canon City and San Juan Railway Company and the Pueblo and Arkan- 451
sas Valley Railroad Company, and as of the date of the commencement of this suit and the date of the said decree, is recognized and established.

Forasmuch, however, as it is alleged by the said plaintiff in certain supplemental bills by it filed herein, that since the said decree, the said defendant hath granted, sold, or otherwise yielded to the said plaintiff its right of way in the premises; and forasmuch as it is also alleged by the said plaintiff that since the said decree the said plaintiff hath built wholly or in part upon the said way and upon the line hereto- 452
fore located by the said defendant, a railway of such gauge and structure as the said defendant hath proposed to build, for which as to the whole or some part thereof, the said defendant ought in equity and good conscience to pay the reasonable value, and because the value of the said railway is at present unknown to the court, no further decree touching the ultimate right of the parties can be given or allowed until the court shall be better advised in the matters aforesaid.

And it is considered by the court, that the relations of the 453
parties of and concerning the line of railway heretofore constructed or now in process of construction, as aforesaid,

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ought not to suffer any change pending such inquiry touching the facts upon which the further and final judgment and decree of the court will be given; therefore let each of the parties be enjoined and restrained from doing any act or thing towards building and completing the said line of railway until the further order of the court. Nor shall either of the said parties interfere with the present possession of the other in
454 the said line of railway, but each shall remain in the possession of that part which it now holds until the further order of the court. And of this order the parties shall take notice without writ or further service. But if either of the said parties shall desire to construct another line of railway on the same right of way without interfering with the grade or road-bed constructed by the said plaintiff or the Canon City and San Juan Railway Company it shall be at liberty to do so.

To advise the Court of and concerning the cost and value
455 of the railway constructed wholly or in part by the said plaintiff and of the several matters hereinafter mentioned, three engineers will be appointed, of whom each of the parties may nominate one who shall report to the Court the matters following:

1st. In constructing two roads from Canon City to the 20th mile post, to what extent must they occupy the same track.

2. Whether the Grand Canon of the Arkansas river is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, or if one be already constructed, then whether
456 such constructed line will interfere with or render impracticable the construction of a second line; whether in the narrow portions of said canon there is any place where this course is impracticable, and if so, whether any road-bed or railroad has been constructed in such place or places, and the cost and reasonable value of the same.

3. If two roads shall be built on the Arkansas river from Canon City to the 20th mile post, to what extent shall they be located on opposite sides of the river and the cost thereof relatively to each other.

4. What has been done by the Canon City and San Juan 457
Railway Company, or the Pueblo and Arkansas Valley Railroad Company towards constructing a railroad from Canon City west to the 20th mile post.

5. What is the location of the line so constructed or partly constructed with reference to the Arkansas river and the defiles and canons thereof.

6. What part of such line is below the Grand Canon of the Arkansas river. As to that part is there space for another line on the same side of the river to be constructed at about the same cost as that which has been built.

7. What is the value of the line from Canon City to the 458
20th mile post as a whole, and in sections and subdivisions.

8. What part of the line so constructed is on the public domain, and what part of it on lands owned by individuals or corporations.

9. What is the value of those parts that are on the public domain and of those parts that are on lands owned by individuals or corporations, stating the value of each such part separately so far as they may be continuous.

In determining the matters aforesaid, the said commissioners shall examine the line, and they may hear any evidence that has been taken in any of the causes pending in this Court 459
between the parties to this controversy. But such evidence shall not be embodied in their report, nor shall it be necessary to refer to the same. The said commissioners shall also hear such testimony relating to the cost of constructing the road as

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may be given before an examiner, not exceeding five witnesses on each side. And upon such evidence, with their own judgment from examination of the work, they shall determine its value. They shall also hear such evidence touching the
460 ownership of the lands traversed by the line as to whether the same are owned by the General Government or by individuals, as may be taken before an examiner, not to exceed five witnesses on each side. On this issue, the plaintiff shall furnish to the commissioners and the defendant a list of the lands traversed by the line, stating in each instance with convenient certainty, and so far as may be known to the plaintiff, the ownership of the lands. No survey by or under the authority of the said commissioners shall be made without authority from the Court, but each of the parties to this suit shall furnish
461 to the said commissioners the notes of surveys by them respectively made, with proper plats and profiles of the same lines. The parties shall proceed to take the testimony herein mentioned touching the cost of the line, and the ownership of the lands traversed by the line without unnecessary delay, and they shall lay the same before the said commissioners whenever the latter may be prepared to consider it. Such evidence shall not be embodied in the report of the commissioners, nor shall it be necessary to refer to the same in such report. It may be
462 returned into court without other authentication than the certificate of the examiner. The commissioners shall be sworn faithfully to discharge the duties enjoined by this order, and their report shall be returned under oath ten days at least before the next term of this Court, and either party shall be at liberty to except to the same. The commissioners nominated by the parties shall be paid by them respectively, and he who is nominated by the court will be allowed a compensation to be hereafter fixed and to be contributed by the parties in equal parts, and finally taxed as the justice of the case may require.
463 To meet the current expenses of that commissioner, each of the parties within three days from this day shall deposit in the

First National Bank of Denver, to the credit of the Clerk, the sum of two hundred and fifty dollars ($250), to be by the Clerk paid to the said commissioner when he shall have been appointed and shall have entered on his duties.

The engineers of each party may, without hindrance from the other, enter on the line and right of way in controversy in this suit for the purpose of verifying their maps and plats of 464
surveys heretofore made by them respectively, but they shall not restake any such line, nor shall they remove any stake or stakes from any such line. Either party shall be at liberty to survey a new line on the opposite side of the river from that which has been constructed or partly constructed and also on the same side of the river with that which has been constructed or partly constructed at points wholly distinct from such constructed line.

Either party shall be at liberty to apply for further order in the premises as they may be advised. 465

And afterwards and on to-wit: the 16th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said court, present the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States assigned to the Eighth Judicial Circuit thereof and the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court in said cause, to-wit:—

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ORDER: Decree modified.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY.	In Chancery. Bill for injunction.
THE DENVER AND RIO GRANDE RAILWAY COMPANY, vs. THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.	Cross Bill for injunction.
THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY, vs. THE DENVER AND RIO GRANDE RAILWAY COMPANY.	Supplemental Bill on Mandate from Supreme Court.

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466

On reading the petition of the Pueblo and Arkansas Valley Railroad Company filed in the above-entitled cause, July 15, 1879, and the affidavit of A. A. Robinson filed therewith,

It is ordered, notwithstanding the objection of the Denver and Rio Grande Railway Company, here in court made, that the order heretofore entered in this cause on the fourteenth day of July, 1879, be so modified as to allow the Pueblo and Arkansas Valley Railroad Company to complete the construction of the bridge now partially constructed in the Royal Gorge of the Arkansas river mentioned in the pleadings herein by putting in place the iron structure for said bridge already procured for that purpose with such fastenings as may be requisite for the proper security of such bridge when completed.

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This order shall not conclude the defendant as to the right of the plaintiff to demand payment for said bridge if the same shall be erected.

And afterwards and on to-wit: the 17th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 18 9, of said court, present the Honorable Moses Hallett, District Judge, the following proceedings were had and entered of record in said court, and in said cause, to-wit:— 467½

ORDER: Commissioners named.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. — In Chancery. Bill.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY, — Cross Bill.

THE PUEBLO AND ARKANSAS VALLEY RAILROAD COMPANY,
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. — Supplemental Bill. 467¾

At this day it is ordered by the court that William Soey Smith, Esq., of Chicago, Illinois, nominated on the part of the Pueblo and Arkansas Valley Railroad Company and the Canon

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City and San Juan Railway Company, George E. Gray, Esq., of San Francisco, California, Chief Engineer of the Southern Pacific Railway Company, nominated on the part of the Denver and Rio Grande Railway Company, and Andrew N. Rogers, Esq., of Gilpin county, Colorado, nominated by the court, be and hereby are appointed as commissioners to report
468 to the court for and concerning the several matters named in the decree of the court lately and at this term entered herein.

ORDERED: That the clerk forthwith certify to each of the said commissioners a copy of the decree aforesaid and of this order of appointment; and request each of said commissioners to give notice to him whether he will act hereunder.

ORDERED: That the said commissioners make their report to the court ten days before the next term of this court.

And afterwards, to-wit: on the 24th day of July, A. D. 1879, came the said defendant by Wells, Smith & Macon, its
469 solicitors, and filed in said court and in said cause its petition for further decree, and the said petition is in words and figures as follows, to-wit:—

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
155 VS.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

IN THE

CIRCUIT COURT OF THE UNITED STATES,

WITHIN AND FOR THE DISTRICT OF COLORADO,

Of May Term, A. D 1879.—In Equity.

At this day comes the said defendant by Wells, Smith & Macon, its solicitors, and suggests to the Court here, that the
470 decree lately and on the 14th day of July instant entered here-

in is not a full and complete decree; nor is this defendant awarded thereby the relief whereunto by the mandate and opinion of the Supreme Court lately filed herein, this complainant is entitled.

Wherefore defendant respectfully prays the Court to give further decree herein, and to award to this defendant the decree prayed and sought by defendant in its petition filed herein on the 7th instant, or such other and different relief as the defendant is entitled under said mandate to have.

WELLS, SMITH & MACON,
Plaintiff's Solicitors.

J. P. USHER,
Of Counsel.

(endorsed)

155.

Circuit Court United States
DISTRICT OF COLORADO.

CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
vs.
DENVER AND RIO GRANDE RAILWAY COMPANY.

PETITION FOR FURTHER DECREE.

Filed July 24, 1879.
EDWARD F. BISHOP,
Clerk.

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And afterwards and on to-wit: the 24th day of July, A. D. 1879, the same being one of the regular juridicial days of the May term, A. D. 1879, of said Court, present the Honora-

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ble Moses Hallett, District Judge, the following proceedings were had and entered of record in said Court and in said cause, to-wit :—

ORDER: Petition for Final Decree Denied.

472 THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY,
155 vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } In Chancery.

At this day the petition of the said defendant for further decree herein coming on to be heard, it is ordered by the Court :

That for the reasons set down in the decree lately and on the 14th day of July, instant, entered herein, the said petition be denied ; and that further and final decree herein be deferred until the other controversies now pending between the parties in this cause as set forth in the former decree of the Court herein shall have been determined.

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And the said petition and form of decree filed on the 7th 473
day of July, A. D. 1879, as aforesaid, were and are in words and figures as follows, to-wit:

PETITION FOR DECREE.

UNITED STATES OF AMERICA,
District of Colorado.

IN THE CIRCUIT COURT OF THE UNITED STATES

WITHIN AND FOR SAID DISTRICT.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.
In Equity.

To the Judges of the Circuit Court of the United States for the District of Colorado:

Your petitioner, the defendant in the above entitled cause, 474
respectfully represents that upon the appeal of your petitioner from the certain decree, heretofore given herein, at the July term, A. D. 1878, of this Court, it was decreed by the Supreme Court of the United States that the decree of this Honorable Court, given herein, at the said July term thereof, should be and was reversed, and this cause was remanded into this Honorable Court with certain directions, which will appear by the

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475 opinion and mandate of the said Supreme Court now on file herein, which your petitioner prays may be spread upon the records of this Court in this cause.

Your petitioner respectfully presents herewith and hereto attached a draft of such orders and decrees as by its counsel it is advised it is entitled to have, and humbly prays that each and every of the same be now signed and enrolled, and that your petitioner be decreed its costs; or that your petitioner

476 have such other and different orders and decrees in its behalf in the premises as to your Honors shall seem to be in conformity with the opinion and mandate of the said Supreme Court; and as in duty bound will ever pray, etc.

(Signed) E. T. WELLS,
Solicitor for Def'ts.

J. P. USHER,
JAS. GRANT,
L. K. BASS,
E. L. SMITH,
THOS. MACON,
} *Of Counsel.*

(endorsed)

NO. 155.

IN THE
Circuit Court of the United States
DISTRICT OF COLORADO.

THE CANON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

PETITION FOR ENTRY OF DECREE ON MANDATE.

Filed July 7, 1879.
(S'd) EDWARD F. BISHOP,
Clerk.

And together with the said foregoing petition, the solicitor of said Denver & Rio Grande Railway Company presented the following form of decree:

FORM OF DECREE.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. 477

This cause coming on to be heard upon the opinion and mandate of the Supreme Court, the parties appearing by counsel, on motion of J. P. Usher and L. K. Bass, for defendants, it is ordered and decreed as by the said opinion and mandate is directed.

First. That the injunction entered in this cause against the Denver and Rio Grande Company on the 24th day of August last be and the same is hereby dissolved and held for 478 naught

Second. It is further ordered, adjudged, and decreed, pursuant to the opinion and mandate of said Supreme Court, that the said Denver and Rio Grande Railway Company has the prior right to occupy and use the Grand Cañon of the Arkansas River, in the bill mentioned and in the opinion and mandate of the Supreme Court specified, for the purpose of constructing its railroad therein; and that the said Cañon City and San Juan Railway Company, its officers, agents, servants 479 and employes, be forever and perpetually enjoined from interfering with or obstructing this company in such occupancy and use of said cañon, or the construction of its said railroad in and through said cañon.

FOLIO

Third. And, whereas, it is suggested in said opinion that it might be that during the pendency of this and a certain other cause in this Court in which the said Denver and Rio
480 Grande Company is plaintiff and Alling and others are defendants, or since the decrees in said causes appealed from, the said Cañon City and San Juan Railway Company had, under the authority of this Court, constructed its road-bed in the said Grand Cañon, or in some portion thereof, and that in such event the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad
481 purposes, may be ascertained and provided for in such manner and upon such terms as the equities of the parties may require: It is therefore ordered, that the said Cañon City and San Juan Railway Company do, on or before the
day of , instant, aptly and in proper form state and show to this Court whether it pretends and claims that it is impracticable or impossible to construct two railroads through said Grand Cañon, and if so, then whether, since the
482 final decree herein, on the 24th day of August, A. D. 1878, and prior to the date of the decree aforesaid of said Supreme Court on April 21st, A. D. 1879, it has constructed as and for its railroad a road-bed and track, or any or either of them, in the said Grand Cañon, or in any portion thereof, which admits of only one road-bed and track for railroad purposes; and if such claim be made, that the said Cañon City and San Juan Railway Company specify:

1. In what part or portion of said cañon said road-bed and track, or either, is located, fixing the termini and length
483 as near as may be of said road-bed and track.

2. When the same was constructed, and by whom or what party; how much, if any, thereof was constructed before the 24th day of August last, and how much thereof subse-

quent to said date and before the 21st day of April last, and how much thereof since the date last named, and the actual cost of the work during the respective times and periods above mentioned.

3. Whether it is the intention of the Cañon City and San Juan Company to construct and operate a railroad through said Grand Cañon. 484

4. Whether the said Cañon City and San Juan Company would prefer to accept from the Denver and Rio Grande Company the value or cost of the work in the portion or portions of said cañon which admit of only one road-bed or track for railroad purposes, or to occupy the same in common with the Denver and Rio Grande Company upon such terms and under such regulations as may be agreed upon or as the Court shall prescribe. 485

Upon the coming in of the claim of said Cañon City and San Juan Company, if one shall be made pursuant to this order, the same shall be open to traverse by the Denver and Rio Grande Company; and the Court reserves to itself to make, and will make, such further order in reference thereto as the justice and equity of the case may seem to require.

(endorsed)

NO. 155.

Circuit Court United States,
DISTRICT OF COLORADO.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

PETITION AND FORM FOR A DECREE OF ENFORCEMENT OF MANDATE SUGGESTED AND DENIED.

Filed July 7, 1879.
(S'd) EDWARD F. BISHOP,
Clerk.

CERTIFICATE OF CLERK.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

I, EDWARD F. BISHOP, Clerk of the Circuit Court of the United States for the District aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record and proceedings *after and including May 7, A. D. 1879*, in a certain cause in said Court, in chancery, lately pending, wherein the Cañon City and San Juan Railway Company was complainant and the Denver and Rio Grande Railway Company was defendant, as fully and completely as the same still remains filed and of record in my office.

IN TESTIMONY to the above, I do hereunto sign my name and affix the seal of the said Circuit Court, at Denver, in said District, this first day of October, A. D. 1879.

Seal

Edward F. Bishop
Clerk.

CLERK'S FEES:
487 folios @ 10c., and certificate $49 05
Paid by D. & R. G. R'y.

1879

Field J.

11-711

Jan. 12 1880

IN THE

Supreme Court of the United States

Ex-parte DENVER AND RIO GRANDE RAILWAY COMPANY.

PETITION FOR MANDAMUS

TO THE

JUDGES OF CIRCUIT COURT OF UNITED STATES FOR COLORADO TO ENFORCE MANDATE OF SUPREME COURT IN THE CASE OF

THE DENVER AND RIO GRANDE RAILWAY CO.

vs.

C. T. ALLING et als.

THE DENVER AND RIO GRANDE RAILWAY CO.

vs.

CANON CITY & SAN JUAN RAILWAY CO.

ARGUMENT OF

S. SHELLABARGER,

In behalf of Denver and Rio Grande.

Thomas McGill & Co., Law Printers, Washington, D. C.

In the Supreme Court of the United States.

Ex-parte THE DENVER AND RIO GRANDE RAILWAY CO.

PETITION TO SUPREME COURT FOR MANDAMUS TO THE JUDGES OF UNITED STATES CIRCUIT COURT FOR COLORADO TO ENFORCE THE MANDATE OF SUPREME COURT.

Argument in Support of the Petition, by Samuel Shellabarger.

In opening this argument, I shall attempt to state the points upon which the relator relies in making this application for mandamus, and shall seek to avoid anything more than such mere statement, making it, however, so explicit and full as that the court and opposite counsel shall be put into possession of the points and authorities on which we rely.

I shall avoid consuming time in giving a history of the cases disposed of by this court in its judgment pronounced on 13th May, 1879. But I state enough about these cases to bring to the recollection of the court just what was involved in them; this simply for the purpose of the right interpretation of the mandate which we now ask to have executed.

The first action, in time, was by the Canon City and San Juan Company (organized 17th February, 1877, under Colorado laws of 1868, to make a road from Canon City to

South Arkansas post-office) against the Denver and Rio Grand Company (organized under Colorado laws of 1870 to build a road along designated lines, amongst which was one through the Grand Canon).

This action was brought in State court of Colorado, but (on April 22, 1878) was transferred to the Circuit Court of United States, where it proceeded on the original bill, two amended bills, answers thereto, cross-bill by the Denver Company, and upon full evidence taken on the merits, covering some six hundred pages of the record. On 12th July, 1878, counsel in this case and in case of Denver Co. *v.* Alling *et al.*, named below, agreed of record that the two cases involved the same matters, and that the pertinent evidence taken should be used in each. (Printed Rec. in Canon City case, 120.)

On 2d August, 1878, the cross-bill of Denver Company was dismissed, (Print., 149,) and *on 24th August*, 1878, a final decree was entered, which recited that, by agreement, this Canon City Company case and said Denver Company case *v.* Alling *et al.* were tried together as one, and the decree (1) dissolved the injunction granted against Canon City Company; (2) authorized the Canon City Company to make from Canon City to end of twentieth mile, and along the route surveyed and filed 23d July, 1877, with receiver; (3) restrained Denver Company from in any way obstructing such construction; (4) suffered the Denver Company to proceed to make its road through the canon either within or without the Canon City's right of way, provided such construction or operation do not interfere with Canon City's construction and operation; (5) with leave to Denver Company to file bill *v.* Canon City Company to compel last-named company to so locate and change its line as to permit at all points convenient construction, or to compel Canon City Company to suffer Denver Company to use the Canon City's track where the gorge is too narrow for two roads. (Printed Rec., 362–364.)

This is one of the decrees of Circuit Court which Denver Company (by the appeal allowed 6th September, 1878) brought to this court.

The said Denver Company, in Circuit Court of United States, on 27th April, 1878, brought its original bill against said Alling and eight others, sued as trustees for first year of said Canon City Company, (so organized February 15, 1877,) and against the Atchison, Topeka and Santa Fe Company and W. B. Strong.

This action was prosecuted on said bill; on first, second, and third amended bills; answers by Alling *et als.*, by Strong and A. A. Robinson, (as engineers locating the Canon City road through canon, 19th April, 1878,) and by Atchison road, and upon the testimony taken in the two cases.

On 24th August, 1878, (Print. Rec., p. 360,) the said bill of Denver Company was dismissed, with leave to said company to exhibit bills as in the decree in the Canon City case is provided.

From this the Denver Company took the appeal to this court, as allowed by M. Hallett, J., 6th September, 1878.

What the issues were in these two cases as they were finally passed upon by the Circuit Court, is indicated with accuracy and sufficient fullness by the following extracts from the opinion of this court, as follows:

Speaking of Canon City Company's case, the court says:

"It claimed that it had complied in all respects with the act of Congress of 3d March, 1875, and had acquired a prior right to construct its road through the Grand Canon one hundred feet on each side of its line, as surveyed in 1877. It charged that the defendant was interfering with the construction of its road upon that line."

Speaking of the said Denver Company case, the court says:

"It claimed an exclusive right of way through the 'Big

Canon,' upon the line of its survey, and one hundred feet on each side of its road, and to that effect relief was asked by final decree."

This opinion also states the substance of the Denver Company's said bill as one alleging, amongst other things, that the Canon City Company—abetted by the defendant, the Atchison Company, and when the Denver Company was, on the 19th of April, 1878, preparing to resume active work on its line located through the canon in 1871 and 1872—by force occupied the said canon and threatened to forcibly dispossess the Denver Company, &c.

Such were the cases tried in the Circuit Court,—such the decrees of that court in these cases; and, hence, such the matters brought into this court by the appeals, and here passed upon by this court in its judgment of 13th of May, 1879.

The mandate of this court, dated 6th May, 1879, reverses the decree of Circuit Court with costs, and remands the case for "*further proceedings to be had therein in conformity with the opinion of the court.*" (See return to mandamus, page 26, bottom.)

We are therefore remitted to the opinion for ascertaining just what the mandate requires.

Keeping in mind what the pleadings were as disclosed by the record, and keeping also in mind that the appeals brought into this court for consideration all the issues, both of fact and law, and also all the evidence in the cases which had been tried and considered in the court below, we now turn to that opinion and state what facts and points of law are established by said opinion and by the mandate adopting such opinion.

Before stating from said opinion the propositions of fact and law bearing upon the *merits* of the cases made by the record, I state from the opinion what alleged facts were, on 20th of January, 1879, (ten days after the parties had sub-

mitted for final judgment to this court, the matters appealed,) submitted to the court, by motion of the Pueblo and Arkansas Valley Railroad Company (the then name of the Canon City Company) and of Alling *et al.*, and of the Atchison Company, for the purpose of securing a dismissal of our appeal.

These alleged facts so by motion presented to court were:

1st. That after filing in this court stipulations for argument of the appealed cases, certain agreements were made, with the assent of the appellees in both cases, between said appellant, the Denver Company, the said Atchison Company, and said Pueblo Company,—and that such agreements were completed and in part executed after the filing of the printed arguments in this court.

2d. That by these agreements said Atchison Company had taken from the Denver Company for thirty years from December 1, 1878, and was then in possession of the constructed part of the Denver Company's line, and had purchased and received the supplies of the Denver Company, and also had purchased and transferred to a trustee a majority of the Denver Company's stock, with an agreement for purchasing the remainder of said Denver stock; also with agreement that said Pueblo Company and said Atchison Company should select a majority of the directors of the Denver Company, and the other third be selected by the holders of the Denver Company's bonds.

3d. That said Pueblo Company owned railroads in Colorado which were extensions through Colorado of the line of the Atchison Company's road from the west line of Kansas.

4th. That these agreements were made to put an end to controversies between the parties thereto, and especially all competitive constructions of lines, as between the Denver

Company, on one hand, and said Atchison Company and other roads operated by it, including said Pueblo road, on the other hand.

5th. On these grounds, the Pueblo Company, (successor to the Canon City Company,) also said trustees, composed of Alling and others, being the appellees, moved that the stipulations submitting the cases on printed arguments be cancelled and such arguments withdrawn, and that the appeals be dismissed. The Atchison Company moved for leave to intervene and take charge of the Denver Company's case, and consent to dismiss the cases. And said trustee, holding the stock so bought by the Atchison Company, assented to the dismissal.

6th. The Denver Company's board, on 7th of February, 1879, unanimously resolved that the claims so set up under these motions were unfounded and fraudulent, and directed the motions to be resisted and the appeals prosecuted to the utmost.

7th. In support of this motion, the parties making it presented to this court, as this court says, "in proper form," the following documents and papers, to wit:

1. Affidavit of Thomas Nickerson, filed January 20, 1879.

2. Affidavit of T. Jefferson Coolidge, filed January 20, 1879, with copy of Alden Speer's agreement annexed.

3. Agreement of Alden Speer, filed January 20, 1879.

4. Copy of memorandum of agreement to be made between the Atchison, Topeka and Santa Fe Railroad Company, the Pueblo and Arkansas Valley Railroad Company, and the Denver and Rio Grande Railroad Company, filed January 20, 1879. (Exhibit B to first supplemental bill.)

5. Certificate of the vote of executive committee of the Pueblo and Arkansas Valley Railroad Company, filed January 20, 1879.

6. Copies of joint orders of president of the Denver and Rio Grande Railroad Company and vice-president of the Atchison, Topeka and Santa Fe Railroad Company, filed January 20, 1879.

7. Form of lease (exhibit C to first supplemental bill) between the Atchison and Topeka and the Denver and Rio Grande Companies, filed January 20, 1879.

8. Affidavit of Thatcher, filed March 15, 1879, with a request for a call of a meeting of the stockholders of the Denver and Rio Grande Company attached.

9. Affidavit of Nickerson, filed March 15, 1879, with papers attached.

8th. On March 20, 1879, this court heard this motion on this showing, having suspended the decision on the merits for the purpose of first hearing that motion.

In overruling these motions and deciding to go forward and decree upon the merits of the case as presented in the record, this court states (in exact substance) the following conclusions:

(1) That, as against the orders of the directors of the Denver Company, no facts disclosed by and under said motions would permit this court to refuse to consider and give judgment in the causes presented by the records, so duly before the court by virtue of the appeals.

(2) That hence this court was bound to proceed to consider and give judgment upon the actual merits of the causes so appealed, any facts disclosed under said motions to the contrary notwithstanding.

(3) That this court's duties were *limited* to a determination of the rights of these parties as they existed when the decrees appealed from were rendered.

(4) That any rights, as against the Denver Company and its property, acquired since the date of the decrees appealed from by the authors of said motions to dismiss, could, notwithstanding any judgment of this court in the appealed

Company, on one hand, and said Atchison Company and other roads operated by it, including said Pueblo road, on the other hand.

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(2) That hence this court was bound to proceed to consider and give judgment upon the actual merits of the causes so appealed, any facts disclosed under said motions to the contrary notwithstanding.

(3) That this court's duties were *limited* to a determination of the rights of these parties as they existed when the decrees appealed from were rendered.

(4) That any rights, as against the Denver Company and its property, acquired since the date of the decrees appealed from by the authors of said motions to dismiss, could, notwithstanding any judgment of this court in the appealed

cases, "*be asserted by appropriate proceedings, and would not be affected by anything this court might determine upon the issues presented by the appeals.*"

We here present the facts and decisions of this court, in regard to these motions, for the purpose of basing upon them the following propositions, which we now submit in support of the application of the mandamus, to wit:

Since it is shown by an inspection of the documents and records so submitted and so fully considered by this court upon said motion to dismiss, and of the facts, proceedings, and documents disclosed by the return made to this court in resistance of our application for mandamus, that the facts and documents now interposed by said return as a reason for refusing said mandamus *are the very same, in every material particular*, which said motions interposed in order to prevent this court from rendering any decrees in the appealed cases, therefore when this court decided that said facts were insufficient to prevent said decree in the cases appealed, the court therein and thereby *necessarily* decided that said facts afford no ground why this court should refuse to enforce by mandate and mandamus the judgment of this court when said facts were *not* sufficient to prevent the court from proceeding to judgment.

Stated shorter, the proposition is, that when this court decided that certain facts were not sufficient ground for refusing to render a judgment, that is a *decision* by this court that the *same* facts are, in this court, no ground for its refusing to award a mandamus to compel its said judgment and mandate to be respected by the court below.

Only two replies to this proposition seem possible.

One is, that it is sometimes required of this court, notwithstanding certain objections urged, to render a judgment and to issue a mandate to enforce the judgment, and yet it is required of this same court to refuse a mandamus to enforce its said mandate, and to base its refusal on the

same objections which were held insufficient to prevent the judgment and the mandate.

This, we submit, is manifestly absurd, and is therefore not to be argued.

The other possible reply is, that the facts presented under said motion to this court could not be here considered because they presented matters which, though depriving the appellant of its right to a judgment, could not be *first* presented in this appellate court because of its lack of jurisdiction to consider them in the first instance. But that since these same facts are now presented to the Circuit Court, as one of first instance, in supplemental bills filed by appellees in the case remanded, and are there pending for adjudication, and may result in a judgment holding that appellant, since the decrees appealed from, parted with the rights which said mandate was meant to enforce, therefore this court will *now* take notice of the pendency and possible result of said supplemental proceedings, and will not grant the mandamus *until* it is ascertained how said supplemental cases are decided.

There are many considerations which show this reply to be unsound. Some of these will be considered in other connections when we come directly to the matter as to what this court has finally adjudged, and to inquire how far supplemental bills may inject into the *same* case, finally decided by this court, issues wholly foreign to the issues which were in the case decided by this court. But right here, I state some considerations which show that the reply now being considered cannot be valid.

1. One reply is, in effect, the same one given by this court as a reason for refusing to suffer the facts disclosed under said motions to prevent this court from rendering said decree and awarding said mandate. The court gives that reason in these words—the interests acquired since the decrees appealed from were rendered "*will not be affected*

by anything we may determine upon the issues presented by this appeal."

Precisely so will not any interest acquired from us since the decree appealed from be affected by having this court's decree entered according to the terms of the mandate. There is, therefore, no *more* reason for refusing the mandamus compelling the execution of the mandate, than there was for refusing the mandate. Whether the decree of this court is by mandamus compelled to be entered below or not, in either case, and *alike* in either case, if, since the decrees appealed from, our adversary has acquired, by lease or otherwise, the rights adjudged to us by the decree, then those rights pass to the purchaser by the law of estoppel, and can, if need be, be "enforced by appropriate original proceedings" as well *after* the court below enters the decree required by the mandate as *before*. This being incontestably so, (and so held in this case by this court,) then *cui bono* in this court's sitting by to see whether the court below will suffer the judgments required by your mandate to go upon the inferior court's record?

2. Another answer to the position that it is your duty to *wait* to see whether the facts, which you would not suffer to prevent your giving judgment and mandate, will not, when thrust, by means of supplemental bills, into cases you have finally decided, result in reversing you in this.

Such position is palpably against the very nature, structure, and office of this tribunal as one of supreme and last resort. If your decisions, instead of being final and conclusive as in the vestiture and establishment of the rights you adjudge, are to become but the beginning of controversy, and are to reach even *entry* upon the records where you command them to go, *only* when the defeated attorney and the reversed judge cannot contrive by supplemental bill to introduce into the case some old or new matter foreign to the issues you tried, then indeed will the occupation of this court, as a supreme one, be gone. The history of

this court's encounters with the antagonistic views and the opposing inclinations of inferior courts, especially of the States, is a demonstration that the moment when this court shall advertise that its mandates need be respected *only* when the reversed judge and defeated lawyer can find no supplemental bill to obtrude into your finally-adjudged cause, will be a moment when this great court will have exchanged places with the tribunals over which it is set by the Constitution for the correction of errors, and will have survived its primacy in our system.

Other and—if possible—more conclusive reasons will appear hereafter why it cannot be that supplemental bills, in courts below, can be made to deprive your mandates of their distinguishing qualities of supremacy and finality.

I now turn to the inquiry upon the direct merits of this application. These merits involve the inquiry, Has your mandate been obeyed? And the first inquiry under this head is, What is your mandate? What propositions of law and fact does your judgment establish? What things does it specifically and peremptorily command the court below to record and execute? And what things are, by the mandate, referred to the court below for further investigation and determination?

The following propositions of fact or law, or both, are peremptorily and specifically found and adjudged in language wholly free from ambiguity or the possibility of being distorted:

1. The Denver Company, by making, in 1871 and 1872, a survey and near location by stakes, work, &c., of its line through the canon; by making a map and profile of said line; by constructing its road by January, 1872, from Denver to Pueblo, and by October, 1872, to within six miles of Canon City, and to said city by July, 1875; and by resumption of work of constructing the road in April, 1878,—did such acts as to preserve from abandonment its right of way

granted by the act of June 8, 1872, and as located through the canon.

2. That when the Canon City Company made its survey of its line through the canon, and when it attempted to make its road through the gorge, it had full notice of the Denver's rights in said gorge and of the said facts which this court find were, in law, conclusive evidence of non-abandonment.

3. The acts done by the Denver Company in surveying, staking, and platting said line; in doing work thereon; in building its road as fast as practicable and judiciously, and in taking possession of said gorge and resuming work on April 19, 1878, for the purpose of constructing its road, make a final appropriation by the Denver Company of the way granted by Congress in the act of June 9, 1872, through said canon.

4. On the 19th of April, 1878, "if not before, the Denver Company came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872; and whatever privileges or advantages belonged to that position, it was entitled to have secured against all intruders."

5. By accepting the five years' extension of time for completing its road to a point on the Rio Grande as far as Santa Fe, granted to the Denver Company by the act of 3d March, 1877, it voluntarily accepted the provisions of the act of 3d March, 1875, and thereby the Denver Company, while not losing its priority of right to construct its road in and use this canon or defile first by it appropriated, became obliged to suffer any other railroad to use the same canon for the construction and use of its road in common with the Denver road.

6. From the foregoing findings, this court found as results the following propositions:

(1) The Circuit Court erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand Canon.

(2) The Denver Company's right to construct its road through said canon is prior to that of the Canon City Company.

(3) "The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the" Canon City Company.

(4) "Where the Grand Canon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so."

(5) But in the narrow portions of the defile, where this course is impracticable, the court, "by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road."

(6) Where, in said canon, it is impracticable or impossible to lay down more than one road-bed and track, the court should recognize the prior right of the Denver Company to construct and operate *that* track for its own business; but should, by proper orders, and on just and equitable terms, establish and secure to the Canon City Company the right to use the Denver Company's same track at said point, after completion, in common with the Denver Company.

Having found and established the foregoing propositions, the court concludes its opinion in the following words:

"The decrees in these causes are, therefore, reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor and dismissing its bill. By proper orders entered in each suit, the court below will recognize the prior right of that company to occupy and use the Grand Canon for the purpose of constructing its road therein, and will enjoin the Canon City and San Juan Railway Company, its officers, agents, servants, and employees, from interfering or obstructing that company in such occupancy, use, and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the de-

crees appealed from, the Canon City and San Juan Railway Company has, under the authority of the Circuit Court, constructed its road-bed and track in the Grand Canon, or in some portion thereon. In that event, the cost thus incurred in those portions of the canon which admit of only one road-bed and track for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

"The court will make such further orders as may be necessary to give effect to this opinion."

Now note what are the things which this opinion (which is, by the mandate, incorporated into itself and made the language of the mandate) settles, for the guidance of the Circuit Court, in language so plain as to not only be free from ambiguity, but so plain as to be incapable of being misunderstood. They are these:

1. That, by act of 1872, the Denver Company has the prior right to construct and operate its road through said canon.

2. That, when the Canon City Company surveyed its line and did its work through the canon, it had full notice of the said prior rights of the Denver Company.

3. That the Circuit Court should have secured to us the immediate right to proceed, unobstructed by the other company, with the construction of our road through said canon, and erred when it enjoined that.

4. The Circuit Court should, by proper orders, recognize and make effectual the priority of the Denver Company's right to proceed, without obstruction, to construct its road through the portions of the defile where too narrow to admit of both companies proceeding with the construction of their respective roads without interfering with each other in such construction.

5. Where the defile is so narrow as to render the laying down of more than one road-bed and track impracticable or impossible, the court should, by proper orders, recognize

and make effectual the Denver Company's prior right to construct *and operate* its road in such places; but should also secure, on just terms, the Canon City's right to use the same road-bed and track, *after its completion*, in common with the Denver Company.

6. The decrees in the cases appealed must both be reversed.

7. The injunction (of 24th August, 1878) restraining the Denver Company from attempting to occupy the Royal Gorge must be immediately dissolved, and all obstructions to the Denver Company's proceeding to construct its road throughout the canon be thus removed.

8. The injunction in favor of the Denver Company (of the 1st of June, 1878; Rec., pp. 41, 43) restraining the trustees of said Canon City Company, and others, from attempting to occupy the Royal Gorge, must be restored.

9. The Circuit Court must make "proper orders," in each suit, recognizing and making immediately effectual the prior rights of the Denver Company to occupy and use the Grand Canon for the purpose of constructing its road through the canon.

10. The said court must enjoin the Canon City Company and its agents from interfering with the Denver Company "in such occupancy, use, and construction."

Every one of these things the mandate of this court commands in language as peremptory and unambiguous as can be employed.

What, in the opinion, follows the foregoing explicit findings and commands, is in no degree in conflict with any of them, and in no way modifies or obscures them. What follows is a provision that, in the event that the said Canon City Company has, during the pendency of these suits and "under the authority of the Circuit Court," constructed its road-bed and track in the Grand Canon, or any portion of it, then, *as to any part of such construction as admits of only one road-bed and track for railroad purposes*, the cost thereof

may "be ascertained and provided for by the Circuit Court in such manner and upon such terms and conditions as the equity of the parties may require."

It is, as seems to me, too plain for argument that this provision is totally *independent* of the absolute, unambiguous, and peremptory requirements of this mandate which command that we shall have possession of the entire right of way, and be allowed, at once, to proceed with the construction of our road through said Royal Gorge. The payment of the cost of the line which, at places too narrow to admit of two road-beds, may have been made by the Canon City Company under the authority of the court, is not made a condition precedent to the enjoyment of rights so explicitly adjudged to the Denver Company, and which consist in the ownership of this right of way, and in the immediate removal of all injunctions and other obstructions to the *present* enjoyment of such adjudged rights of way.

Such are the peremptory requirements of the mandate of this court.

I next turn to what has been the action of said court in executing said mandate.

On 13th May, 1879, the mandate of this court, found in the printed "Return," at pages 23 to 27, was filed in the Circuit Court, and at the same time the Denver Company made a motion for a decree upon this mandate. (Return, pp. 27, 28.) Instead of granting this motion, the court, on the same day, granted leave to the Pueblo and Arkansas Valley Railroad Company, as successor to the said Canon City Company, to file a supplemental bill. On the 20th of May, the court ordered it to be filed within three days; and it was filed on the 24th May, and extends from page 30 to 92 of record. Its prayer is that the original decrees reversed by this court "*may be permitted to stand without modification or change.*"

This prayer indicates the character of the whole bill. It is founded on the documents and alleged facts which were, in this court, made the foundation of the motion to dismiss our appeals.

On 22d June, 1878, in the case where the Denver Company was plaintiff, the Pueblo Company filed a petition alleging the completion of its road to the twentieth mile-post west from Canon City on the north side of the river, &c., and asking investigation and report of cost of said construction, and of the construction of a road on the south side, and for leave to complete certain parts of road, &c.

Said Pueblo Company, on leave, filed on 26th June, 1879, its second supplemental bill, setting up, amongst other things, the cost it had incurred in constructing its road through and near the canon, and for an accounting as to the cost of such construction, and for such relief as equity may require.

Demurrer and answers were filed to these bills, which need not be here specially described; but the answers denied the allegations of the bills, set up various defenses showing the various agreements, leases, &c., relied on in the bills to be invalid and not binding.

On 7th June, 1879, Denver Company filed a petition for a decree on and according to the mandate of this court, and accompanied the petition with the form of an entry which it assented to. These are at pages 163 to 167 of printed return. This petition recognized the obligation to take an account of and pay for any work done *under the conditions stated at the end of the opinion of this court.*

The court refused all motions of the Denver Company to enter the decree asked, and never entered any *other* decree, recognizing said mandate, than that entered on 24th July, 1879, found at pages 152–157 of return.

As this is the especial action of the Circuit Court which is complained of as a total failure to satisfy the mandate of this court, its exact provisions must be accurately noted.

1. As required by the mandate, it reverses in the case where the Canon City is plaintiff at the costs of plaintiff.

2. It declares that the Denver Company's right to construct its road on the way described in the bill against the Canon City Company, and as of the date of the commencement of this suit and of said decree, "is recognized and established."

3. It then recites that it is alleged *in supplemental bills* that since the said reversed decree the Denver Company has *yielded its right of way to the plaintiff;* and also that since said decree said plaintiff (Pueblo Company) hath wholly or in part built upon the line heretofore located by defendant (the Denver Company) a road such as the Denver Company "proposed to build," for which, as to the whole or some part, the Denver Company ought to pay the reasonable value; and because that value is not known to the court, therefore *no further decree touching the ultimate rights of the parties can be given till the court is further advised.*

Based upon this recital, the court then proceeds to order as follows:

1. *That the relations of the parties to the part of the line constructed, or in process of construction, ought not to suffer any change during said inquiry touching the facts on which the further final decree will be given.*

2. *That each party be restrained until further order of the court from doing any act toward building and completing the said line.*

3. *That neither party should interfere with the other's possession as then held, and each should retain possession as then held, until further order.*

4. *But if either party desires to construct another line of road on same right of way, without interfering with the grade or roadbed of the plaintiff, or of the Canon City Company, it shall be at liberty to do so.*

Then the court provides for the appointment of the commissioners, and requires them to hear evidence and report

to the court upon the things set forth at pages 154 to 157 of the return.

Although much here ordered to be investigated does not seem to have any legal relation to any of the specified matters about which the mandate contemplated that the Circuit Court might be required to make "orders" from time to time, yet it is not necessary for us to make any discussion touching the *scope* of this order to investigate, as distinguished from the fact of this investigation being ordered to precede, in point of time, our leave to proceed to make our road. Our complaint is about the other features of this decree, which we have above specially pointed out.

Without further arguing the repugnance between this decree and the said mandate than I have now done, by simply laying by side of each other, one by one, the orders of this court in said mandate and the order of the Circuit Court as found in said decree, I now make a catalogue of the respective repugnances here presented.

In stating these repugnances, I, for the present, *assume* that the mandate does not contemplate the postponement of the dissolution of the injunction against us, and our right to proceed with our road, until *after* the Circuit Court should first investigate and settle the value of work done by the Canon City Company, on the faith of the Circuit Court's decrees, in the parts of the gorge too narrow for two roads. I shall hereafter consider the said question of postponement.

So assuming, the plain repugnances between the mandate and the Circuit Court's decree are, amongst others, the following:

1. The mandate says the Circuit Court erred in enjoining the Denver Company from proceeding with the construction of the road in the Grand Canon, (Return, 21,) and orders that injunction to be dissolved; (Return, 22;) but the Circuit Court does not order any dissolution of said

injunction, but, on the contrary, orders a new injunction against the Denver Company.

2. The opinion (which is embodied in the mandate) explicitly shows, and hence the mandate commands, that (here I quote) "the Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other company," and then, to the obvious end that the Denver Company might so proceed, the mandate proceeds with these words: "The decrees in these cases are therefore reversed, with *directions* to set aside" (of course this means immediately) "the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor and dismissing its bill."

This language is not only an order giving the Denver Company immediate possession of the entire line of its road through the gorge, but is one forbidding all obstructions thereto, by its revival of the injunction, in favor of the Denver Company, of date June 1, 1878. (Record, 43.)

But the Circuit Court not only enjoined the Denver Company from proceeding to make its road—not only refused to restain the Canon City Company from obstructing our work—but it most explicitly prohibited our taking possession of any part of our line then in possession of our adversary.

3. The mandate was not content with this general order giving us unobstructed possession of the entire canon. It provided in detail for the different parts.

(1) As to any part wide enough to allow both companies to proceed in constructing both roads without interfering with each other, the court explicitly commands that both be allowed to proceed.

(2) As to any part too narrow for this, it commands that the court secure to the Denver Company its prior right to "proceed to construct its road."

(3) As to any part where the gorge may be too narrow

for more than one track and road-bed, it orders the court to secure the Denver Company's *prior* right "to construct and operate that track for its own business," and also to secure to the Canon City Company the right to use, on equitable terms, that track in common with us, after its construction.

Every one of these detailed provisions is wholly ignored by the Circuit Court, and is explicitly forbidden by its new injunction; and not only this, but the investigation, by commissioners, which the Circuit Court orders, *and which it makes to stand in the way of executing the mandate*, takes in matters which in no conceivable view of the mandate can be needed for the purposes of the decree required by the mandate. As, for example, the mandate makes the Denver Company liable to pay for *no possible* work done by other companies on its right of way, unless two facts as to such work shall concur, to wit, that (1) the work was done "*under the authority of the Circuit Court*"; and (2) that *it was done in "those portions of the canon which admit of only one road-bed and track for railroad purposes.*" Since the "cost" of nothing but *this* could, in any event, come upon the Denver Company if the mandate is to be respected, then in what possible view is it that the investigations about what part of the road is on individuals' lands? what the value of the line outside of the gorge? to what extent two roads outside of the gorge ought to be built on opposite sides of the river, and the relative costs of these are ordered.

It cannot be useful to pursue the catalogue of repugnances further. It, we think, will not be claimed that the mandate of this court and the decree of the Circuit Court professing to execute it are not repugnant, *provided* they cannot be reconciled by one or both of two considerations, to wit:

(1) That it is, as a matter of law, not required of the Circuit Court to obey the mandate of the Supreme Court, whenever the defeated party shall tender, in a supplemental

bill, to the Circuit Court, facts which, had they been duly pleaded and proved in the original case, might have resulted in a different mandate from this court. Or

(2) That the present mandate, taken as a whole, and fairly interpreted, requires of the Circuit Court, *before* it shall dissolve the injunction and protect the Denver Company in the possession of its right of way and its construction of its road through the canon, to do one or more of the following things spoken of in the opinion, namely:

(1) Ascertain where, in the canon, the companies can make two roads without interfering with each other in the construction, and where this cannot be done.

(2) Ascertain where, in the canon, it is impracticable to lay down more than one track, and as to such portion secure to the Denver Company the prior right to make its road in that part, and to secure to the Canon City Company the right to use, on equitable terms, that part, in common with the Denver Company, after its completion. Or

(3) Ascertain whether the Canon City Company, under the authority of the Circuit Court, had done work in parts of the canon which were too narrow to admit of more than one road-bed and track for railroad purposes; and if so, to ascertain the cost thereof, and secure payment of such cost.

I will state first why these things just specified and named in the opinion do not show a purpose in this court to postpone the dissolution of the injunction and our construction of our road until after either of these three investigations and orders.

Some reasons showing there was no such intent to postpone apply alike to all three of said matters. Amongst such are the following, to wit:

(1) The order to dissolve the injunction against us and to restore the injunction in our favor (and which is a license to at once proceed with our work) is made in the same sentence with the order to reverse the decree, and in precisely the same peremptory and unqualified manner; showing

that when the judgment was reversed, then also was the Denver Company to be licensed to proceed with its work unobstructed.

(2) There is no word or hint in any part of the opinion that this removal of injunctions and license to proceed were not to be immediate and contemporaneous with the reversal of the judgment, but all other parts of the opinion are in harmony with the plain import of the language ordering a dissolution of the injunction, as language requiring such dissolution upon the filing of the mandate.

(3) The opinion hints at no reason why our right of possession should be postponed till after either one of these investigations, and the case before the court, and the undisputed conclusion of the court that we owned the said right of way and had been long kept out of possession thereof wrongfully, required of the court that it should not longer keep us out of possession of our own property, and do this for the benefit of those whom the court found were trespassers, in so far as they sought to deprive us of our *prior* right of possession and construction.

(4) Had the court found that there was something requisite to be ascertained or done as a condition precedent to the dissolving of the injunction and our going into possession, then it would have been required of this court, both by the obvious sense of the matter and by the universal practice of the court, to have declared, in the decree, that the injunction should not be dissolved *until* such condition precedent had been performed; and not to do what the court does do—order the dissolution unconditionally.

In addition to the foregoing reasons—applicable to all three matters mentioned in the opinion, and which contemplate inquiry by the Circuit Court at *some* time—there are other reasons against postponement of dissolution of the injunction which are specially applicable against post-

ponement, in order to find out whether any part of the gorge would admit of but one road-bed and track.

Amongst these are the following:

(1) As to all and every part of the gorge, however wide or narrow it might be, the court found that the Denver Company had the right of way prior to all others, had located its line, and ought long before to have been suffered to make its road on that line; and the court did not propose to require it in any event to change that line, however narrow any part of the gorge might be. This being so, of what avail, in law or equity, would it be for the court to postpone our right to at once proceed with our construction in any and every part of the gorge, whatever might be its width?

(2) Not only so, but the court expressly orders that if any part of the defile should be so narrow that both companies could not, without interfering with each other, proceed at the same time to construct their respective roads in such narrow parts, then the Denver Company's prior right to construct in such part should be recognized.

This being so, what possible end of justice could be attained by postponing our taking possession of said prior right to construct until the court could investigate whether there were such narrow places?

(3) As to the investigation contemplated by the opinion, looking to securing to the Canon City the right, in common with the Denver Company, to use the track of the last-named company at places where there could be but one track, it is expressly stated in the opinion that the use here provided for was one which was to begin only "when" our road was there "constructed"—of course constructed by the Denver Company.

Why, then, postpone our right to make that "construction" until the court should first ascertain whether there was such a narrow place, and fix the terms of its common enjoyment by the two companies?

It is, we submit, impossible that we should be mistaken when we say that this mandate suffers no postponement of the dissolution of the injunction beyond the time when the decree must first be entered on the mandate.

I shall next consider whether the matter recited in the Circuit Court's decree of 14th of July, 1879, (Return, p. 153,) about the supplemental bill, constitutes good ground for postponing the dissolution of the injunction and giving us possession of the rights adjudged us by the mandate.

That recital is in these words:

"Forasmuch, however, as it is alleged by the plaintiff in certain supplemental bills by it filed herein, that since the said decree" (reversed) "the defendant hath granted, sold, or otherwise yielded to the said plaintiff its right of way in the premises," &c.

This, as a reason for postponing the execution of this court's mandate, I shall consider in various aspects.

And first, wholly independently of the fact that this supplemental bill is presented to the Circuit Court after a final decree on the merits in this court decreeing that the Denver Company owns this right of way, and commanding immediate surrender of possession thereof to such owner, I deny that a supplemental bill can import into *any* case, at any stage of it, what is here recited by the Circuit Court as the ground of the supplemental bill.

On this point, observe (1) that the whole scope of the original case, as it stood in the pleadings and proofs when it was decided in this court, was an assertion that plaintiff owned this disputed right of way by grant of Congress under the act of 3d March, 1875. It was an assertion that the Denver Company had no title of any kind, and never had any, and that plaintiff's title was one not derived from the Denver Company, but derived from the United States, adversely to the Denver Company's pretended title.

Observe (2) that the title to the right of way, as set up in the supplemental bill, and as recited in the Circuit Court's decree of 14th July, 1879, is one derived wholly from the Denver Company. The supplemental bill is, therefore, one not only abandoning wholly the case which was prosecuted by the plaintiff until it was finally lost in this court, but one alleging that the plaintiff had no case, and that the Denver Company's title was good, and that by the purchase of that good title the plaintiff has acquired the disputed right of way from the defendant, the Denver Company, which right it may now assert in the original case by means of a supplemental bill.

It is this which we submit can never be done in any case, at any stage thereof.

This propositition of law is stated by Story (Eq. Pl., sec. 339) in these words:

"To entitle the plaintiff to file a supplemental bill and thereby obtain the benefit of the former proceedings, it must be in respect to the *same* title in the same person as stated in the original bill. Thus, if a person should file an original bill, as heir at law of the mortgagor, to redeem, and it should turn out upon an issue and hearing of the cause that he is not the heir at law, and he afterwards purchases the title of the true heir at law, he cannot file a supplemental bill to have the benefit of the former proceedings; *for he claims by a different title from that asserted in the original bill.* His true course would be to file an original bill."

In 2 Daniell's Chancery, page 1515, note 1, (4th Amer. ed.,) the same thing is stated in these words:

"A plaintiff cannot support a bad title by acquiring another after the filing of the original bill, and then bring it forward by supplemental bill."

And see same thing in the following cases:

Tonken *v.* Sethbridge, Coop. Eq., 33; 9 Coop., 43.
Oldham *v.* Eboral, 1 Coop. Sel. Cas., 27.

Rylands *v.* La Touche, 2 Bligh, 586.
Pelkington *v.* Wignal, 2 Mad., 240–244.
Byrne *v.* Byrne, 1 Conner & Lawson, (Irish,) and 1 Drury & Walsh, 71.
Davidson *v.* Foley, 3 Bro. C. C., 598.
Pechard *v.* Draper, 1 R. & M., 191.
Winn *v.* Albert, 2 Mad. Ch. Dec., 42.
Godfrey *v.* Tucker, 33 Beav., 280; 9 Jur. N. S., 1188, and cases cited.

For the purpose of reversing this court's decree on the original case—of securing the benefits of the prior injunctions in that original case—of resisting this court's mandate in such original case,—the plaintiff in the original case now comes, after it has lost its original case, and, by claiming title under Denver Company, sets up in the *same* lost case, by supplemental bill, that it had no original case; that it rightly lost it, and that it bought the title in *after* it had lost its case, which its said lost case said did not exist! It now asks this court, because of the supplemental bill, to refuse to enter the decree, when the supplemental bill confesses that the decree which the supplemental bill seeks to reverse was not only a right decree, but when it also confesses that its original case was without merit. It asks that it may, by its supplemental bill, not only set up a *wholly different title* from that asserted in the original bill, but a title which the original bill alleged did not exist, and which, did it exist, defeated the entire original case!

Certainly *such* a supplemental bill, offered at *any* stage of *any* case, cannot be allowed, and would be discarded by the court as preposterous. And can it be that *such* a supplemental bill shall, after a final decree of this court of last resort, and after mandate for that decree's execution, be deemed a ground for overthrowing that mandate which the supplemental bill confesses to be *right*, by setting up

the very title of the Denver Company which the mandate affirms?

My next proposition is, that even if the last preceding one were not true, and if it were true that in *some* cases a supplemental bill may introduce into a case a totally new ground of recovery—*alien* to the one relied on in the original bill—yet a supplemental bill which sets up, in the Circuit Court, in order to defeat a mandate upon a final decree of this court, facts arising after the decree which this court reviewed, can never accomplish such defeat.

Stated in another way, the proposition is this: The final decrees and mandates of this court are, as to all matters within, and duly submitted to, its jurisdiction, absolutely final, and binding on the Circuit Court, and, after the term at which the decree was rendered, are *equally* conclusive and binding on this court, according to their true sense and legal effect; and the rights which such final decree awards are *vested rights;* and such decrees cannot be reviewed, reversed, or modified, upon a supplemental bill or otherwise, even by *this* court, and much less by the Circuit Court, which can only *execute* the mandates of this court according to their true signification.

I have already stated some of the reasons and illustrations which enforce this proposition. I now proceed to enforce this by the light of the decisions of this court.

Please observe that what I now assert is not that the Circuit Court has no power to *construe* this court's mandates where there is such ambiguity as leaves just room for doubt and for construction.

Neither am I asserting, that where this court remands causes with directions to the court below to further try and adjudicate rights not finally settled by this court's decrees, in such case the Circuit Court may not proceed to adjudicate the unadjudged rights so remanded according to its own sense of law, when this court has laid down no guide for the further proceeding.

What I *am* asserting is, that when this court has finally adjudged any given matter or right duly submitted to its jurisdiction, and has, by mandate, ordered that right to be recognized and enforced by the Circuit Court, then, *as to that adjudged right*, the Circuit Court has no other jurisdiction, discretion, or power, save the power to *enforce execution* of the matter or right so adjudged.

Neither supplemental bill or other device can be resorted to for retrying said right so adjudged, or for delaying or avoiding the execution of the mandate.

Remember, I am now considering this case upon the assumption that it is plain that this court finally adjudged that the Denver Company, at the date of the decree appealed from, owned the prior right to the way through this gorge, and that the mandate ordered that prior right to be enforced, and that resort to the lease, &c., alleged in the supplemental title, is had as a lawful ground for excusing the Circuit Court from executing a mandate which is unconditional, peremptory, and unambiguous in its decreeing the enforcement of *that* right.

Now, in enforcing the present proposition that a supplemental bill or other contrivance cannot be resorted to in the Circuit Court, so as to excuse the duty of rendering the final decree required by the mandate, I submit—

1st. That when this court holds that its decrees so confer vested rights—rights perpetually fixed and evidenced by this court's records, and which cannot be reviewed or withdrawn by this court, then that is a decision that the Circuit Court cannot review or modify that judgment, nor refuse to enter of record the said judgment required by the mandate.

And this court has uniformly held that it has no power to review, revise, or modify its judgments or decrees of a former term, whether brought back to this court by second appeal, or second writ of error, or otherwise.

"The rule," says the court, "is universal that second appeals and writs of error bring up only the proceedings *subsequent* to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree;" (17 Wall., 283;) and on a second appeal or writ of error to the Supreme Court, that court itself cannot "inquire into the merits of its decree rendered on the first hearing." "The Supreme Court has no *power* to review its decisions, whether in a case at law or equity. (1 Wheat., 355; 6 Wheat., 113, 116.) Both are *conclusive of the rights of the parties thereby adjudicated.*" (3 How., 425, 426.) "The want of power in this court to review its own judgment or decrees has been so frequently determined by it that it is not now an open question." (5 Cr., 314; 1 Wheat., 304.)

"*None* of the questions which were before the court on the first writ of error can be reheard or examined upon the second." (17 Wall., 284.)

See the cases cited; 3 How., 425, 426; 17 Wall., 283, 284–290, (Thayer *v.* McGuire.)

And see the cases all cited in Kennicott *v.* Supervisors, 94 U. S., 499.

2d. I submit, next, that when the court decides that the court below has no power, right, or discretion about a plain and unconditional mandate of this court, save the power and duty to enter and execute the decree it requires, that is a direct and explicit decision that the court has no power or discretion about entertaining a supplemental bill directed to defeat the entering of the decree required by the mandate.

In support of the proposition that the *only* power of the court below over an unconditional mandate is that of entering and executing a decree according to its terms, and also as recalling to the court its decisions touching various other principles affecting the merits of this application for mandamus, I crave the indulgence of the court in pre-

senting here a statement of some of the cases adjudged in this court.

In Supervisors *v.* Kennicott, 4 Otto, 498, the case had come to this court by appeal a second time. On the first appeal the court had reversed the decree of the Circuit Court, and had ordered *a new trial*, but such trial to be had "in conformity to the opinion and decree of the court, as according to right, &c., ought to be had."

The said first decree in this court was that certain bonds and mortgages were valid, and the *bona-fide* holders entitled to a decree for the amount. In the "*new trial*" so ordered, the party resisting the validity of the bonds sought to retry some of the matters involved in the Supreme Court's decision that the mortgage and bonds were valid. The court below and the Supreme Court held that the "*new trial*" could only cover "*such further action as should be found necessary to carry into effect what had been already decided*," and could not retry *anything* as to the *validity* of the bonds or mortgage. (4 Otto, 499.)

In West *v.* Barshear, 14 Pet., 54, this court says:

"Undoubtedly the mandate" (of the Supreme Court) "must be its" (the Circuit Court's) "guide. It is the judgment of this court transmitted to the Circuit Court. *And when the direction contained in the mandate is precise and unambiguous, it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for authority to change its meaning. But where, as in this case, the Circuit Court is referred to testimony to ascertain the amount to be decreed, and are authorized to take new evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case the court below have unquestionably the right to resort to the opinion delivered at the time, in order to assist them in explaining it.*"

This case is approved in Supervisors *v.* Kennicott, 4 Otto, 499.

In *ex-parte* Dubuque and Pacific Railroad Company, 1 Wall., 69, the Supreme Court of the United States had at

a former term (December term, 1859, 23 How., 90) reversed the judgment of the Circuit Court of the United States for Iowa in an ejectment case, and directed a judgment to be entered by the Circuit Court for the defendant in the ejectment, and a mandate was so issued. Under this mandate the Circuit Court *entered judgment for defendant.* And (on affidavit) the plaintiff immediately moved a *new trial*, which was granted, and thereupon the party resisting such "new trial" applied to the Supreme Court of the United States for mandamus to compel the Circuit Court to obey the said mandate of the United States Supreme Court and stop said "new trial," and to vacate the order therefor. This mandamus was so ordered; the court holding that the Circuit Court "*had no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate.*"

The ground on which the Circuit Court claimed power to grant a "new trial" was that the laws of Iowa would so require of the Circuit Court if such *Circuit Court* had rendered said decree on its own judgment, without any mandate; and held that it could do the *same* thing when the judgment was rendered under said mandate. This court rejected that view, and in doing so used the words above cited. (1 Wall., 73.)

In *ex-parte* Morris and Johnson, 9 Wall., 605, the Supreme Court of the United States ordered a mandate against the judge of the District Court of Alabama to compel him to execute a mandate of said Supreme Court, which mandate directed said judge "to cause restitution to be made" to certain appellants to the Supreme Court who had obtained said mandate, of whatever they had been compelled to pay under the decree appealed from.

In deciding to award the mandamus, the court says (9 Wall., 607):

"The duty of the District Court is very simple, and its power ample. *The mandate of this court must be obeyed as far as practicable.*"

The case of Tyler *v.* Maguire, 17 Wall., 253, is one where the complainant sought in equity to have the legal title to certain lands adjudged to him, but the Supreme Court of Missouri, after trial on the merits, dismissed his bill, and he appealed to this court, which considered the case on the merits, and gave an opinion finding the legal title to be in plaintiff, the appellant, reversing the court below; and the opinion gave utterance upon every point affecting said merits. The mandate remanded the case "for further proceedings in conformity with the opinion of the court." (8 Wall., 672.)

The court below, under the mandate, reversed its judgment, declared the legal title to be in plaintiff, and then proceeded to decide that the bill of plaintiff must be dismissed, because equity had no jurisdiction of legal titles in Missouri. This court, on a second appeal, reversed that decree, and in doing so, and because this court's opinion showed that it had considered and decided the merits of the question of title, the court below could neither question this court's jurisdiction of this question of title, nor do any other thing than enter judgment on the merits, as required by the findings set forth in the opinion.

This court says the court below was "as *much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree.*" * * * * * "Argument to show that a subordinate court is bound to *proceed* in such an event, and *dispose of the case as directed, and that they have no power either to evade or reverse the judgment of this court,* is unnecessary, as any other rule would operate as a repeal of the Constitution." * * * "This court *decided every question* at issue between the parties *which it was necessary to decide to dispose of the case on the merits;* and it is clear that it is *not competent even for this court, after the term expired, to review and reverse such a decree.*" (17 Wall., 282, 283.)

In every essential particular this case decides what rela-

tor asserts in applying for this mandamus. The opinion in the present case examines the entire case on its entire merits, in the light of all the evidence, and states every conclusion reached by this court on each point of fact and law going to dispose of the matters of title, and on these findings the court proceeds not only to adjudge the title in relator, but it explicitly orders the injunction dissolved which restrains our proceeding to enjoy our said title, but it also orders a restoration of the injunction which prohibits our adversary from interfering with our possessions. And this court commits to the Circuit Court not an inquiry, order, or discretion in conflict with this order for our immediate possession, but only suffers inquiries and orders as to a common use of a *possible* part of our track *after it is constructed* by us, and as to payment by us, in the future, for designated work, should such work be found to have been done.

What we claim under the authority of this case is, that it rules our present application. The fact that, in *this* case, the device to avoid executing the mandate is a resort to a supplemental bill, makes no difference. That such a device for avoiding the mandate is no better than the "second trial" device in *ex-parte* Dubuque, 1 Wall., 69, or the "new trial" attempt in The Supervisors, 4 Otto, 498, or "the remedy at law" evasion in Tyler *v.* Maguire, 17 Wall., 253, we submit is exceedingly obvious.

The cases are uniform and explicit in enforcing the proposition we are now asserting, namely, that the court below must promptly, fully, and exactly enter and execute the mandates of its superior according to their just legal signification, and that the court below cannot avoid such execution in any way, either by allowing second trials or new trials, or by introducing new parties or new issues, or by retrying any matter decided, or by entertaining supplemental bills, or by questioning the jurisdiction of the court

below, or of the court sending the mandate, or by any other device.

See the following additional cases:

Skillern's Executors *v.* May's Executors, 6 Cr., 267.
Cunningham *v.* Ashley, 13 Ark., 670.
State *v.* Harrison, 21 Ark., 197.
Gunter *v.* Laffan, 7 Cal., 588.
Argente *v.* San Francisco, 30 Cal., 459.
Abrams *v.* Lee, 14 Ill., 167.
Soul *et al. v.* Dawes, 14 Cal., 249.
Person *et al. v.* Merrick, 5 Wis., 231.

I have already alluded to the lack of reason for suffering the mandates of this court to be thwarted, and its final judgments deprived of recognition and record in the courts to which they are sent, because of any transfer of the title in suit *after* the date of the final decree. I have called attention to the fact that this court, in this case, has decided that any alleged rights growing out of such transfer are wholly unaffected by the judgment which your mandate seeks to enforce. I wish now only to add that since your judgment is a *judgment;* is one beyond even *your* power to change or impair; (17 Wall., 283;) is one which bas already, in fact and law, invested the Denver Company with the prior and superior right to the way through this defile; is one which has already placed our title on the records of this court; and since, moreover, the supplemental bill does not deny our title as asserted in the original case, but, on the contrary, admits it by seeking, as its assignee, under it to hold possession and nullify your mandate,—therefore this whole supplemental proceeding is demonstrated to be a mere device under which this original bill and case is to be kept on foot; your mandate ignored; the injunctions against us perpetuated instead of dissolved; the decree on the supplemental bill appealed to this court, and thus the Denver Company kept out of possession of property de-

creed to it by a judgment of this court as peremptory and unambiguous, in every essential particular, as any ever put upon your records.

I assert this cautiously and upon the authority of the facts of this case.

It cannot be denied that had your mandate been entered and the injunctions dissolved, and we restored to our rightful possession, these facts would not, in the slightest degree, have added to the Canon City's burdens in the recovery, by original bill, of our right of way, beyond what these burdens are under this supplemental bill. But had that course been taken, the Denver Company would, during the litigation, be in possession of its right of way. Hence this extraordinary resort to a supplemental bill, instead of an original one, for the obvious purpose of annulling the mandate of this court, and thus securing by these oblique methods the possession and, virtually, the property which it lost by its direct appeals to the court.